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No. 12980

United States
Court of Appeals
for the Ninth Circuit.

---

of MYRON SELZNICK, Deceased, BANK AMERICA NATIONAL TRUST and SAVINGS ASSOCIATION, DAVID O. SELZNICK and CHARLES H. SACHS, Executors,

Petitioners,

vs.

ISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

---

tion to Review a Decision of the Tax Court of the United States.

United States
Court of Appeals
for the Ninth Circuit.

---

of MYRON SELZNICK, Deceased, BANK AMERICA NATIONAL TRUST and SAVINGS ASSOCIATION, DAVID O. SELZNICK and CHARLES H. SACHS, Executors,

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Transcript of Record

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tion to Review a Decision of the Tax Court of the United States.

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APPEARANCES

itioner:
EPH D. BRADY, ESQ.,
L. NOSSMAN, ESQ.,
CIEN W. SHAW, ESQ.

pondent:
. TONJES, ESQ.

Docket No. 14985

E OF MYRON SELZNICK, Deceased,
NK OF AMERICA NATIONAL TRUST
O SAVINGS ASSOCIATION, DAVID O.
ZNICK and CHARLES H. SACHS, Ex-
ors,

Petitioners,

vs.

SSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

-Petition received and filed. Taxpayer notified. Fee paid.
-Copy of petition served on General Counsel.
-Request for Circuit hearing in Los An-

1947

Aug. 20—Copy of answer served on taxpa
Angeles Calendar.

1948

Sept. 23—Hearing set November 29, 1948
Angeles, California.

Nov. 29—Hearing had before Judge Van F
merits. Stipulation of facts v
hibits 1-A thru 11-K attached
tioner's brief due 1/13/49. Resp
brief 2/14/49. Petitioner's reply

Dec. 21—Transcript of hearing 11/29/48 fi

1949

Jan. 11—Brief filed by taxpayer. Copy s

Feb. 1—Motion for extension to 3/12/4
brief, filed by General Counsel.
Granted to 3/12/49.

Apr. 1—Memorandum Opinion rendered
Van Fossan. Decision will be
under Rule 50. Copy served.

Apr. 13—Motion to withdraw the mem
opinion and to permit filing of
er's supplementary brief, brief
filed by taxpayer. 4/14/49 Denie

Apr. 25—Motion for review by the Court
of a division filed by taxpayer.
Denied.

May 3—Computation for entry of decis
by General Counsel.

May 4—Hearing set 6/1/49 on settlement

-Decision entered. Judge Van Fossan. Div. 9.
-Order and decision entered. Judge Arundell. Div. 7.
-Petition for review by U. S. Court of Appeals, 9th Circuit with assignments of error filed by taxpayer.
-Proof of service filed.
-Designation of record filed by taxpayer. Service acknowledged thereon.
-Certified copy of order from 9th Circuit for transmission of original exhibits 2-B, 3-C, 4-D, 5-E, 6-F, 7-G, 8-H, 9-I and 10-J filed.

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he Tax Court of the United States

Docket No. 14985

E OF MYRON SELZNICK, Deceased, K OF AMERICA NATIONAL TRUST SAVINGS ASSOCIATION, DAVID O. ZNICK and CHARLES H. SACHS, utors,

Petitioners,

vs.

SSIONER OF INTERNAL REVENUE,

Respondent.

petitions for a redetermination of the asse
ficiency set forth by the Commissioner of
Revenue in his notice of deficiency (LA:E
NAB) dated March 27, 1947, and as a basis
proceeding alleges:

1. Bank of America National Trust and
Association, a national banking association
O. Selznick and Charles H. Sachs are the
pointed and acting executors of the last
testament of Myron Selznick, who died on
23, 1944. The Federal estate tax return
estate of said decedent was duly filed w
Collector of Internal Revenue for the 6th
of California on June 22, 1945 and the
$294,099.92 was paid to said Collector on sa
as Federal estate tax of said estate.

2. The notice of deficiency (a true and
copy of which with accompanying statemer
tached hereto and is marked Exhibit A) was
by respondent on March 27, 1947.

3. The taxes in controversy are estate
the amount of $409,634.05—the asserted de
of $384,634.05 plus the amount of an overp
hereby claimed of not less than $25,000.

4. The determination of deficiency in
forth in the said notice of deficiency is base
the following errors:

(1) Respondent erred in determining
value of 100 shares owned by decedent of

ent and in failing to determine that the
aid stock was not in excess of $12,592.50
ate.

espondent erred in determining that the
1000 shares owned by the decedent of
ock of United Studios, Inc., a Delaware
on, was $12,000 on the date of decedent's
in failing to determine that the value of
was not in excess of $6,000 on said date.

espondent erred in determining that the
ommissions payable by clients, whom de-
presented as agent, was $271,590.21 and in
determine that the value of said commis-
able was not in excess of $79,390.42.

espondent erred in determining that the
he claim of decedent for commissions re-
nder a contract between Myron Selznick
n Selznick, Inc., parties of the first part
d Hayward, Leland Hayward, Inc., Le-
ward and Co., Ltd., Leeward Royalties,
Deverich and Hayward-Deverich, parties
ond part, was $9,594.77 on the date of de-
eath and in failing to determine that the
aid claim was not in excess of $2,186.67.

espondent erred in determining that the
the claim of decedent for commissions
agency contract with Hunt Stromberg
000 on the date of decedent's death and
to determine that said claim had no value
ate.

should be included in the gross estate (as a
item 64 on Schedule F, Other Miscellaneo
erty) a settlement with Marguerite Robe
claim of decedent against said individual
missions, in determining that the value
claim was $6,500 on the date of decedent
and in failing to determine that said clain
value on said date.

(7) Respondent erred in determining t
should be included in the gross estate (
tional item 65 on Schedule F, Other Misc
Property) a claim of decedent against
Donat for monies advanced, in determin
the value of said claim was $21,866.36, on
of decedent's death, and in failing to d
that said claim had no value on said date.

(8) Respondent erred in determining t
should be included in the gross estate of
transfers of property made during decede
to a trust made by decedent on January
in the amount of $152,951.83, and in failin
termine that no amount should be include
gross estate of decedent on account of tra
property to said trust in excess of the a
$130,817.79, which was reported as item 1 o
ule G of Form 706 filed by said estate.

(9) Respondent erred in including in
estate of decedent the value of life insura
cies transferred by decedent to the trust
him on January 29, 1932, and mentioned

in said gross estate on account of said policies in excess of the amount of $39,- hich was reported as item 2 in Schedule n 706 filed by said estate.

Respondent erred in failing to allow as on a claim of Florence A. Selznick against in the amount of $14,535.01.

Respondent erred in failing to allow as a a claim of Mildred Selznick against the the amount of $27,575.00.

Respondent erred in failing to allow de- f certain Federal and state income taxes property taxes, and interest thereon, ac- or to the date of decedent's death.

Respondent erred in failing to allow de- f certain administration expenses includ- nissions of the executors, extraordinary ees, expenses of preparation of the Federal ax Return and reasonable fees of tax coun- a) the preparation of the petition herein; proceedings within the Bureau of Internal prior to trial; (c) for the trial and brief- ese proceedings before the Tax Court of ed States and (d) for the representation state in any appellate court proceedings y eventuate.

Respondent erred in failing to allow a or the amount of estate, inheritance, succession taxes actually paid or payable

of property of the decedent included in
estate.

(15) Respondent erred in determin
there is any deficiency and in failing to d
an overpayment.

5. The facts upon which the estate re
basis of this proceeding are as follows:

(1) With respect to the assignment
set forth in paragraph 4 (1) the facts are

(a) On the date of his death, deceden
Selznick, owned 100 shares of the capital
Myron Selznick, Ltd., a New York corpor
gaged in the business of acting as agent f
and directors.

(b) The capital stock of Myron Selzn
was never at any time listed on any stock
and was never at any time traded in
counter or otherwise sold or exchanged.
shares of stock of said corporation owne
decedent represented all the outstanding
said corporation.

(c) The value of said shares on the da
cedent's death was not in excess of $125
share or a total value for the 100 shares
592.50. Said shares were valued at said
item 22, Schedule B of Form 706 filed
estate.

(d) In his final determination of the
deficiency, respondent valued said shares
at $39,958.34.

On the date of his death, decedent owned
res of the capital stock of United Studios,
Delaware corporation, engaged in the busi-
holding real property and collecting rents
n.

The capital stock of United Studios, Inc.,
r at any time listed on any stock exchange
never at any time traded in over the
or otherwise regularly sold or exchanged.
The value of said shares of United Studios,
the date of decedent's death was not in ex-
6 per share or $6,000 for the 1,000 shares
the decedent. Said shares were valued
mount in item 25 of Schedule B of Form
by the estate.

n his final determination of the asserted
, respondent valued said shares of stock
0.

With respect to the assignment of error set
sub-paragraph 4 (3) the facts are:

Prior to his death, decedent had for many
ed as agent for actors, actresses, produc-
ers, directors and others engaged in the
icture industry and in the entertainment
erally, by obtaining for them employment,
their relations with their employers and
assisting them in their professional ac-
In this capacity, decedent had entered
ontracts with a large number of such in-
by the terms of which he was entitled

by a percentage of the compensation of su
viduals.

(b) On the date of the death of the d
there were unpaid amounts totalling $79,39
crued and payable to decedent as commiss
services theretofore rendered by decedent
such agency contracts then in effect.

(c) As of the date of decedent's death,
lection under said agency contracts of any
in addition to the amounts accrued and pa
said date was wholly contingent and uncer
it was not possible to determine on said da
further amounts, if any, might be collecte
under. As of said date said agency contr
not represent an asset of the estate (to an
in excess of the amounts accrued and pa
said date) which could have been sold.

(d) On the date of decedent's death, t
of claims of decedent under such agency c
was not in excess of the sum of $79,390
resenting the amounts accrued on said date
missions previously earned. Said value on
of said commissions was reported in item 54
ule F of Form 706 filed by the estate.

(e) In his final determination of the
deficiency, respondent valued said claims
cedent under agency contracts at $271,590

(4) With respect to the assignment of
forth in sub-paragraph 4 (4) the facts are
(a) On September 30, 1940, decedent

Hayward, Inc., a New York corporation, Hayward and Co., Ltd., a California cor- Leeward Royalties, Inc., a California cor- Nat Deverich and Hayward-Deverich, a a corporation, were parties of the second

Under said contract, decedent transferred arties of the second part certain agency and received in exchange therefor a right tion of the commissions derived by the f the second part therefrom, payable if, as n such commissions were received by the f the second part.

s of the date of decedent's death, there ued and payable to decedent under said the sum of $2,186.67.

As of the date of decedent's death, the col- nder said contract of any amounts in addi- ne sum accrued and payable on said date ly contingent and uncertain and it was not to determine on said date what further if any, might be collected thereunder.

he value of the claim of decedent under ract on the date of decedent's death was which amount was reported in item 55 ule F of Form 706 filed by the estate.

n his final determination of the asserted , respondent valued said claim of decedent d contract at $9,594.77.

With respect to the assignment of error set

employed by Hunt Stromberg, a motion
director, to advise and assist in the orga
and operation of an independent motion
production enterprise, being organized by
berg.

(b) In 1942, said employment was re
writing in an agency contract whereby
was employed by Hunt Stromberg as agent
to receive as commission 10% of the stoc
corporation formed to carry on said enterp
10% of Stromberg's compensation from
terprise, only if, as and when such comp
should be received by Stromberg from sa
prise for his personal use.

(c) As of the date of decedent's deat
pute had arisen between Stromberg and
as to said agency contract and Stromberg
asserting that decedent was entitled to
thereunder. Furthermore, after decedent
Stromberg asserted that said death termina
agency contract and all of his obligation
under.

(d) As of the date of decedent's death,
lection of any amounts under said contr
Stromberg was wholly contingent and u
and the claim of decedent thereunder had
(e) In his final determination of the
deficiency, respondent valued decedent'
against Hunt Stromberg at $200,000.

n agency contract with Marguerite Rob-
eby he represented said individual as
ior to said date, decedent had determined
as not receiving the amounts due to him
l agency contract and had brought an
inst Marguerite Roberts in the Superior
the State of California in and for the
Los Angeles for damages for breach of
act.

id action was pending on the date of de-
eath and was then and had theretofore
sted by the defendant, Marguerite Rob-
o recovery therein had been obtained.

ter decedent's death, the executors of the
led the claim against Marguerite Roberts
m of $6,500 paid to the estate in settle-
eof.

the date of decedent's death, the col-
any amounts from Marguerite Roberts
contingent and uncertain and said claim
arguerite Roberts had no value.

his final determination of the asserted
respondent valued decedent's claim
arguerite Roberts at $6,500.

ith respect to the assignment of error set
ub-paragraph 4 (7) the facts are:

the year 1940, Robert Donat, a British
cture actor, was a client of Myron Selz-
don) Ltd., an agency controlled by the

(b) During the summer of 1940, dece
asked to advance to Robert Donat fund
support, in the United States, of Mrs. I
her children, because they had no fun
United States. Decedent agreed thus t
funds because he desired to retain the
of Robert Donat as a client of his Lond
and because he believed that Donat m
come to the United States in which event
employ decedent as agent in the United

(c) During the period between Aug
and the summer of 1943, decedent advanc
Donat sums totalling $21,886.36.

(d) During the period between Aug
and the summer of 1943, decedent had re
repayment in any form of the amounts
to Mrs. Donat, and inquired as to when
expect to be reimbursed for the sums
vanced. Decedent received no satisfact
from Robert Donat and, thereupon, cease
further payments.

(e) Between 1940 and the present tim
Donat has never been in the United S
neither he nor his wife have any prope
United States. As of the date of decede
no amount had been collected on accou
sums advanced to Mrs. Donat, and no
edgment of the obligation therefor had
tained from Mr. or Mrs. Donat.

(f) The executors of decedent's es

ne obligation. The executors have been
hat it would be illegal for Robert Donat
n indebtedness outside of England ex-
e amount of funds which he could have
emitted outside of England.
of the date of decedent's death, said
not enforceable and not collectible and
ue.
his final determination of the asserted
respondent valued decedent's claim
bert Donat at $21,886.36.
ith respect to the assignment of error
n sub-paragraph 4 (8) the facts are:
January 29, 1932, decedent made a dec-
f trust as trustor and named therein
National Trust and Savings Bank of Los
national banking association, as trustee
rust was designated as Citizens' National
Savings Bank Trust #6969.
ior to June 6, 1932, decedent made trans-
perty to said trust, which property as of
f decedent's death had a value of $152,-

the terms of said trust, decedent re-
right to receive in monthly payments
of the property transferred to said trust
led that none of the income of said prop-
ne period between the last such monthly
nd the date of decedent's death was to

(d) Said transfers made to said trus
June 6, 1932, were not transfers intende
effect in possession or enjoyment at
death and were not transfers under which
retained for his life or any period not e
fore his death the possession or enjoym
the income from, said property.

(e) After June 6, 1932, decedent mad
transfers of property to said trust which
had a value as of the date of decedent's
$130,817.79, which amount is conceded
cludible in the estate (and of which all
was reported as includible in the estate
of Schedule G of Form 706 filed by the

(f) None of the transfers of propert
trust in excess of the amount of $130,
ferred to in sub-paragraph (e) above are
in the gross estate of decedent.

(g) In his final determination of th
deficiency, respondent included in the gr
of decedent the property having a value
date of decedent's death of $152,951.83
817.79 referred to in sub-paragraphs (b)
above, respectively.

(9) With respect to the assignment
set forth in sub-paragraph 4 (9) the fac

(a) On January 29, 1932, decedent m
laration of trust as trustor (as heretofo
in paragraph 5 (8) (a)), naming Citi
tional Trust and Savings Bank of Los A

n or about January 29, 1932, decedent
d by assignment to said trust certain in-
olicies on his life. Said policies are listed
le G of Form 706 filed by the estate.
fter the transfer of said policies to the
ne amounts receivable thereunder as in-
ere receivable by said trustee and this
t all times after said transfers and until
vas made to the trustee under said poli-
decedent's death.
id transfers of insurance policies made
st prior to June 6, 1932, were not trans-
ded to take effect in possession or enjoy-
decedent's death and were not transfers
ch decedent retained for his life or any
ending before his death the possession
ent of, or the income from said property.
no time after January 10, 1941, did de-
ssess any incident of ownership in the
policies thus transferred to said trust.
e total amount received by said trustee
ce under said policies was $188,275.31 of
proportion equivalent to the proportion
al premiums for such insurance paid on
January 10, 1941, was $148,805.10 and
tion equivalent to the proportion of total
for such insurance paid after January
vas $39,470.21.
said amount received by said trustee as

(h) None of the amount received by sa
as insurance under said policies, in exc
amount of $39,470.21 referred to in sub-
(f) above, is includible in the gross est
cedent.

(i) In his final determination of th
deficiency, respondent included in the gr
of decedent said amount of $39,470.21 r
in sub-paragraphs (f) and (h) above an
tion included therein the additional a
$148,805.10 referred to in sub-paragraph
on account of said insurance.

(10) With respect to the assignment o
forth in sub-paragraph 4 (10) the facts

(a) Florence A. Selznick was the mot
cedent and of his brother, David O. Selzn
mencing prior to 1936 and at all times
Florence A. Selznick was without funds v
to provide support for herself.

(b) Prior to 1936 decedent and Davi
nick agreed to provide for the support o
A. Selznick by paying for said purpose e
weekly. Said agreement was made in vie
respective obligations to support Florenc
nick as provided in California Civil Cod
206.

(c) Commencing in 1936, the weekly
made by decedent for the support of F
Selznick were made by the segregation o

id funds were at all times held for the Florence A. Selznick and decedent had no right, title or interest therein. From me, amounts were withdrawn from said ly by or for the benefit of Florence A.

the date of decedent's death, there re- said funds the sum of $14,535.01 which t been expended by or on behalf of Flor- lznick.

said date, the segregation of said funds nt represented a transaction completed ne date of death of decedent whereby the Florence A. Selznick therein became fully d said segregation did not constitute an contract.

agreement of decedent to transfer funds ce A. Selznick by means of segregating bona fide and was in consideration of his to support Florence A. Selznick and of nent of David O. Selznick to discharge his of support by providing similar sums for rt of Florence A. Selznick which agree- esented adequate and full consideration or money's worth.

orence A. Selznick filed a claim against for the amount transferred to her by de- 4,535.01, which claim was on June 6, 1944, nd approved by the Superior Court of

estate, and the amount of said claim wa
Florence A. Selznick by the estate on June

(h) The claim of Florence A. Selznic
said estate for $14,535.01 was properly all
a deduction from the value of the gross e
reported in item 4 of Schedule K of Form
by said estate).

(i) In his final determination of the
deficiency, respondent did not allow said
Florence A. Selznick as a deduction from
of the gross estate.

(11) With respect to the assignment
set forth in sub-paragraph 4 (11) the fa

(a) In February, 1943, Mildred Selz
and for many years had been the wife of
Selznick, a brother of decedent and David
nick. In said month, Mildred Selznick co
an action against decedent and David O.
in the Superior Court of the State of C
in and for the County of Los Angeles.

(b) In said action, Mildred Selznick
two claims against decedent and David O
as follows:

(i) A claim for damages for breach of
which she alleged to have been made wi
decedent and David O. Selznick by the
which she alleged that she had surrend
right to obtain a divorce from Howard
and had rendered services in caring for h
change for the alleged agreement of dec

h living accommodations for herself for her natural life and for her children reached their majority, and in addition least $75 per week and provide financial r her so long as she should live.

aim in tort for alleged deceit on the part and David O. Selznick in inducing her ner claims and rights against Howard nen decedent and David O. Selznick had n of carrying out the contract alleged n made with her.

action in the Superior Court was re- ecedent and was pending at the date of Thereafter it was vigorously resisted te. Ultimately, prior to a trial of said in March, 1945, the executors of dece- te and David O. Selznick agreed with lznick upon a compromise settlement of claims in said action in the Superior ne payment to her of money and prop- at $55,150.00 of which the estate's share .00

compromise settlement was submitted erior Court of the State of California the County of Los Angeles in a special in the probate of decedent's estate. In proceedings, on May 1, 1945, the Su- rt approved the compromise settlement d and approved the claim of Mildred

(e) The claims of Mildred Selznick th
by a payment to her by the estate of
were (i) as to the claim based upon th
contract, contracted bona fide and for an
and full consideration in money or mone
and, (ii) as to the claim in tort for alle
represented an alleged liability imposed b
of the State of California and arising out
of decedent. The amount paid in settleme
claims represented an allowable deduction
value of the gross estate (as reported i
of Schedule K of Form 706 filed by the e

(f) In his final determination of the as
ficiency, respondent did not allow said
Mildred Selznick as a deduction from th
the gross estate.

(12) With respect to the assignment o
forth in sub-paragraph 4 (12) the facts

Prior to the final determination of Fed
tax liability, decedent's estate will have pa
items of the character described in the a
of error in paragraph 4 (12) of this petit
items are properly deductible in the fi
mination of the net estate.

(13) With respect to the assignment o
forth in sub-paragraph 4 (13) the facts

Prior to the final determination of Fed
tax liability, decedent's estate will have
further liability for items of the cha
scribed in the assignment of error in pa

th respect to the assignment of error set
b-paragraph 4 (14) the facts are:
the final determination of Federal estate
y of decedent's estate certain items of
e character described in the assignment
paragraph 4 (14) of this petition will
paid or be payable. Decedent's estate
tled to an appropriate credit therefor.
ron Selznick, hereinbefore referred to
dent, was born on October 5, 1898, in
Pennsylvania and died a resident of
lls, California, on March 23, 1944. His
ing administered under the laws of the
alifornia.

e, petitioner prays that this Court de-
t there is no deficiency in estate tax;
contrary there has heretofore occurred
ment of Federal estate tax; that the
mine as a part of its decision that the
payment was paid within three years be-
iling of the deficiency notice, or in the
any further payment should be made,
rther payment was made after the mail-
otice of deficiency; and grant such other
r relief as may be equitable in the

/s/ JOSEPH D. BRADY,
/s/ WALTER L. NOSSAMAN,
/s/ LUCIEN W. SHAW,

State of California,
County of Los Angeles—ss.

H. M. Bardt, being first duly sworn, sa
is Vice President and Trust Officer of
America National Trust and Savings Ass
national banking association, which is
duly appointed and acting Executors (v
O. Selznick and Charles H. Sachs), of
of Myron Selznick, deceased, petitioner h
affiant is duly authorized to verify the
petition; that affiant has read the foreg
tion, is familiar with the statements
therein and that the facts stated are true
to those facts stated to be upon inform
belief and those facts he believes to be

/s/ H. M. BARDT

Subscribed and sworn to before me thi
of June, 1947.

[Seal] /s/ JULIA M. FITZSIM
Notary Public in and for the County o
geles, State of California.

My Commission Expires February 17

EXHIBIT A

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Mar. 27, 1947.

nternal Revenue Agent in Charge,
es Division, LA:ET:90D:NAB

Myron Selznick, Deceased

merica National Trust and
ssociation et al, Executors
Beverly Drive
ills, California

:

e advised that the determination of the
liability of the above-named estate, dis-
eficiency of $384,634.05, as shown in the
attached.

dance with the provisions of existing in-
enue laws, notice is hereby given of the
or deficiencies mentioned.

90 days (not counting Saturday, Sunday
holiday in the District of Columbia as
ay) from the date of the mailing of this
may file a petition with the Tax Court
ted States, at its principal address, Wash-
D. C., for a redetermination of the de-

requested to execute the enclosed form
ward it to the Internal Revenue Agent i
Los Angeles, California, for the attentio
Conf. The signing and filing of this form
pedite the closing of your return (x) b
ting an early assessment of the deficienc
ciencies, and will prevent the accumulatio
est, since the interest period terminates
after filing the form, or on the date asse
made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, J
Commissioner.

By GEORGE D. MARTIN,
Internal Revenue A
in Charge.

Enclosures:

Statement

Form of waiver

LA:ET.90D:NAB
District of Sixth California
Estate of Myron Selznick

Date of Death: March 23, 1944

Statement

	Liability	Assessed
Estate Tax	$678,733.97	$294,099.92

In making this determination of the federal estate
of the above-named estate, careful consideration has
to the report of examination dated June 28, 1946, to
dated November 8, 1946, and to the statements r
hearing on January 20, 1947.

A copy of this letter and statement has been ma

to net estate:

r basic tax as disclosed rn		$ 974,850.04
value of net estate and n deductions:		
nd bonds	$ 33,365.84	
iscellaneous property	428,848.84	
s	301,848.37	
rs commissions	3,500.00	
's fees	17,446.37	
decedent	42,110.01	827,119.43
		1,801,969.47
n value of net estate and n deductions:		
expenses	$ 154.10	
neous administration es	7,295.44	7,449.54
r basic tax as adjusted		$1,794,519.93
additional tax as		1,834,519.93

Explanation of Adjustments:

onds	Returned	Determined
	$ 12,592.50	$ 39,958.34
	6,000.00	12,000.00
	18,592.50	$ 51,958.34
		$ 33,365.84

ined values of $399.58 per share for stock of Myron . (N.Y.) and of $12.00 per share for stock of United , are predicated upon consideration of all relevant elements of value disclosed by the evidence on file, ation being given to corporate earning and dividend ity.

	$ 79,390.42	$ 271,590.21
	2,186.67	9,594.77
	0	200,000.00
60—S.A.G. dues		
	0.	625.00
61—Return prem. employment tax	0	96.59
62—Return prem.		
	0	44.01
63—Refund of costs		

Addl. Item 65—Claim against Robt. Donat	θ	
	$ 81,577.09	$
Difference		

The determined value of item 54 is predicated up
amount collected to March 26, 1946, plus one-half
mated balances. See exhibit A accompanying 30-da
details.

The determined value of item 55 is predicated up
amount collected. See exhibit B accompanying 30-da
details.

The determined value of item 59 is based on th
amount that would have been received by the estate
tract with Hunt Stromberg had been terminated
death and an accounting had of moneys and properti

Additional items 60, 61 and 62 are refunds recei
estate of dues and premiums paid prior to date of

Additional item 63 is a refund of costs received b
from Mr. Brannen in connection with the Pastor I
in 1941.

Additional item 64 is the amount received by th
settlement in full with Marguerite Roberts on accru
January 29, 1942 and March 23, 1944.

Additional item 65 is the amount owing to the
date of death by Robert Donat and it is included at
because it has not been shown that this claim was
death of no value.

Transfers during decedent's life:

The value of the following described property, tra
the decedent in his lifetime, is included in the gros
being determined that such transfer was intended to
in possession or enjoyment at decedent's death and co
the provisions of section 811(c) of the Internal Rev

Item 1	$ 130,788.98	$
Item 2	39,407.58	
Funeral expenses	5,649.90	
Difference		

Funeral expenses are allowed in the amount paid
by the evidence on file.

Executors' commissions	$ 40,000.00	$
Difference		

Executors' commissions are allowed in the total
lowed by the Court and paid to date as shown by th
on file as follows

f America N.T. & S.A.:
r 29, 1944, on account
tory commissions, $7,-
cember 28, 1945, com-
allowed by the Court
ordinary services, $20,-
otal, $27,500.00.
s H. Sachs: December
on account of statutory
ons, $2,500.00; Janu-
1945, commissions al-
the Court for extraor-
rvices, $6,500.00; total,

al of commissions paid, $36,500.00

fees	$ 75,000.00	$	57,553.63
			17,446.37

fees are allowed in the total amount allowed by
d paid to date as shown by the evidence on file, as
mber 21, 1944, extraordinary fees, $6,500.00; Janu-
on account of statutory fees, $5,000.00; December
a fees, $20,000.00; March 14, 1946, extra fees, $22,-
h 14, 1946, on account of statutory fees, $3,500.00;
.63.

administration expenses:

	$ 1,000.00	$	1,295.44
Item 16. Arbitration			
Andy Devine	0		2,000.00
Item 17, Attorney fees			
arker, Milliken & Kohl-			
account	0		5,000.00
	$ 1,000.00	$	8,295.44
			7,295.44

he amount paid to White & Case for attorney fees
is allowed in lieu of the amount claimed as esti-
e.

expenses paid to the S.A.G. is allowed as Addi-
6 and the amount paid on account to special tax
wed as additional Item 17.

dent:

	$ 14,535.01	0
	27,575.00	0

Computation of Estate Tax	Returned	Determined
Gross estate for basic tax	$1,392,173.45	$2,156,236.50
Deductions	417,323.41	361,716.57
Net estate for basic tax	$ 974,850.04	$1,794,519.93
Net estate for additional tax	$1,014,850.04	$1,834,519.93
Gross basic tax		$ 115,006.79
Credit for estate and inheritance tax		0
Net basic tax		$
Total gross taxes (basic and additional)	$ 678,733.97	
Gross basic tax	115,006.79	
Net additional tax		
Total net basic and additional taxes		$
Total tax payable		$
Estate tax assessed: July 1945 list, page 102, line 3		
Deficiency		$

Upon receipt of a waiver, or upon the expiration from the date of this letter, if a petition is not file Tax Court of the United States, $292,628.62 of th will be assessed.

As the balance of the deficiency may be eliminate for State estate, inheritance, legacy, or succession t tunity will be accorded for the submission of the quired by section 81.9 of Regulations 105. If after time the evidence is not filed, the balance of the de be assessed. Please advise when the credit evidence pected.

Received and filed June 23, 1947. T.C.U.S.

[Title of Court and Cause.]

ANSWER

al Revenue, for answer to the petition of
-named taxpayer, admits and denies as

2. Admits the allegations contained in
s 1 and 2 of the petition.
nits that the taxes in controversy are estate
that the asserted deficiency is in the
$384,634.05 as alleged in paragraph 3 of
n and denies the remainder of said para-

(15), inclusive. Denies that the respond-
as alleged in subparagraphs (1) to (15),
of paragraph 4 of the petition.
. Admits the matter set forth in sub-
(a) of paragraph 5(1) of the petition
lack of information sufficient to form
to the truth or falsity thereof it is denied
n Selznick, Ltd., a New York corpora-
ngaged in the business of acting as agent
and directors as alleged in said subpara-

enies the allegations contained in sub-
(b) of paragraph 5(1) of the petition.
dmits that 100 shares of Myron Selznick,
valued at $12,592.50 in item 22, Sched-
Form 706 filed by the estate as alleged in
aph (c) of paragraph 5(1) of the peti-
denies the remainder of said subpara-

paragraph (a) of paragraph 5(2) of th
except for lack of information sufficient
belief as to the truth or falsity thereof it
that United Studios, Inc., was a Delawar
tion engaged in the business of holding
erty and collecting rents therefrom as
said subparagraph.

(b). Denies the allegations containe
paragraph (b) of paragraph 5(2) of the

(c.) Admits that 1,000 shares of Unite
Inc., were valued at $6,000 in item 25 of S
of Form 706 filed by the estate as alleg
paragraph (c) of paragraph 5(2) of th
and denies the remainder of said subpara

(d). Admits the allegations containe
paragraph (d) of paragraph 5(2) of the

5(3)(a) and (b). Admits the allega
tained in subparagraphs (a) and (b) of
5(3) of the petition.

(c). Denies the allegations contained i
graph (c) of paragraph 5(3) of the petit

(d). Admits that $79,390.42 on accou
commissions was reported in item 54, Sch
Form 706 filed by the estate as alleged i
graph (d) of paragraph 5(3) of the pe
denies the remainder of said subparagraph

(e). Admits the allegations containe
paragraph (e) of paragraph 5(3) of th

5(4) (a) to (d), inclusive. Denies t

edule F of Form 706 filed by the estate as
subparagraph (e) of paragraph 5(4) of
on and denies the remainder of said sub-
n.

dmits the allegations contained in sub-
n (f) of paragraph 5(4) of the petition.
to (d), inclusive. Denies the allegations
in subparagraphs (a) to (d), inclusive,
aph 5(5) of the petition.

dmits the allegations contained in sub-
n (e) of paragraph 5(5) of the petition.
. Admits the allegations contained in
aph (a) of paragraph 5(6) of the petition.
enies the allegations contained in sub-
n (b) of paragraph 5(6) of the petition.
dmits the allegations contained in sub-
n (c) of paragraph 5(6) of the petition.
enies the allegations contained in sub-
(d) of paragraph 5(6) of the petition.
dmits the allegations contained in sub-
n (e) of paragraph 5(6) of the petition.
and (b). Denies the allegations con-
subparagraphs (a) and (b) of paragraph
e petition.

dmits the allegations contained in sub-
n (c) of paragraph 5(7) of the petition.
enies the allegations contained in subpara-
of paragraph 5(7) of the petition.

dmits that as of the date of decedent's

graph (e) of paragraph 5(7) of the petitic
nies the remainder of said subparagraph.

(f) and (g). Denies the allegations
in subparagraphs (f) and (g) of paragrap
the petition.

(h). Admits the allegations containec
paragraph (h) of paragraph 5(7) of the

5(8)(a). Admits the allegations con
subparagraph (a) of paragraph 5(8) of
tion.

(b). Admits the matter set forth in
graph (b) of paragraph 5(8) of the petiti
the qualification "prior to June 6, 1932,"
denied.

(c) and (d). Denies the allegations
in subparagraphs (c) and (d) of paragrap
the petition.

(e). Admits the matter set forth in
graph (e) of paragraph 5(8) of the pe
cept the qualification "after June 6, 193
is denied.

(f). Denies the allegations contained
paragraph (f) of paragraph 5(8) of the

(g). Admits that in his final determi
the asserted deficiency, respondent includ
gross estate of decedent the property
value as of the date of decedent's death
769.62 as alleged in subparagraph (g) of p
5(8) of the petition and denies the rem

dmits the matter set forth in subpara-
of paragraph 5(9) of the petition except
of information sufficient to form a belief
truth or falsity thereof denies that the
were made "on or about January 29,
alleged in said subparagraph.
f), inclusive. Denies the allegations con-
subparagraphs (c) to (f), inclusive, of
5(9) of the petition.
dmits that $39,407.58 was reported as in-
ncludible in the estate in Schedule G of
filed by the estate as alleged in subpara-
of paragraph 5(9) of the petition and
remainder of said subparagraph.
enies the allegations contained in sub-
(h) of paragraph 5(9) of the petition.
dmits that in his final determination of
ed deficiency, respondent included in the
te of decedent $188,275.31 on account of
ance as alleged in subparagraph (i) of
5(9) of the petition and denies the re-
f said subparagraph.
) to (h), inclusive. Denies the allega-
ained in subparagraphs (a) to (h), in-
paragraph 5(10) of the petition.
dmits the allegations contained in subpara-
of paragraph 5(10) of the petition.
) to (e), inclusive. Denies the allega-
ained in subparagraphs (a) to (e), in-

5(12), (13) and (14). Denies the a
contained in paragraphs 5(12), (13) and (1
petition.

5(15). Admits the allegations contained
graph 5(15) of the petition.

6. Denies each and every allegation
in the petition not hereinbefore specifica
ted or denied.

Wherefore, it is prayed that the dete
of the Commissioner be approved.

/s/ CHARLES OLIPHANT
Chief Counsel, Bure
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
E. A. TONJES,
H. A. MELVILLE,
Special Attorneys, Bureau of
Internal Revenue.

Received and filed Aug. 19, 1947, T.C.U

[Title of Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by th
to the above-entitled proceeding by their r
counsel, as follows:

respect to disposition of the issues set
Petition as paragraph 4, subparagraphs
3), (4), (5), (6), (7), (10), (11), (12),
14). These are set forth below in para-
mbered to correspond with said sub-
of paragraph 4 of the Petition, the
and agreements of the parties with
hese issues.

by stipulated and agreed that the Court
follows:

value of 100 shares owned by decedent
stock of Myron Selznick, Ltd., a New
ration, was $26,000 on the date of death
dent.

value of 1000 shares owned by the de-
apital stock of United Studios, Inc., a
orporation, was $6,800 on the date of de-
ath.

value of commissions payable by cli-
decedent represented as agent, referred
54 in the statement accompanying the
ter, on the date of decedent's death
4.

value of the claim of decedent for com-
eivable under a contract between Myron
d Myron Selznick, Inc., parties of the
nd Leland Hayward, Leland Hayward,
Hayward Co., Ltd., Leeward Royalties,
Deverich and Hayward-Deverich, par-

(5) The value of the claim of decedent missions under an agency contract w Stromberg, was $20,000 on the date of death.

(6) The value of a claim of decede Marguerite Roberts for commissions was the date of decedent's death.

(7) A claim of decedent against Rob for moneys advanced, on the date of death had no value.

(10) A claim of Florence A. Selzni the decedent's estate in the amount of is not an allowable deduction for Fede tax purposes.

(11) A claim of Mildred Selznick a decedent's estate in the amount of $27 lowable as a deduction for Federal estat poses in the amount of $20,681.

(12) and (13) Federal and State inc and State property taxes and interest t crued prior to the date of decedent's administration expenses incurred by the claimed in the estate tax return nor allo 90-Day Letter, are properly deductible in of $33,589.79. In addition, if the foll cumstances occur, further fees of counsel ceeding shall be allowed as an additional as follows:

If an appeal from this proceeding to Circuit Court of Appeals is taken by ei

· party thereafter applies for a writ of
to the Supreme Court of the United
urther deduction for such fees of $1,000
owed, upon proof of payment of same.
a writ of certiorari is granted, a further
for such fees of $2,500 shall be allowed,
of payment of same.
h respect to this proceeding, the Peti-
incurred or will incur other costs and
nd the amount thereof (not exceeding
le amount), if properly established by
ner, will be allowed as a deduction in any
n made herein pursuant to Rule 50.
nder the provisions of Section 813(b) of
l Revenue Code, as amended by Section
Revenue Act of 1939, and limited by
6(a) of the Internal Revenue Code, a
state inheritance taxes in the amount
or by law shall be allowed to the peti-
time prior to sixty days after the deci-
Tax Court herein becomes final, if proof
is established in accordance with the
of Section 81.9 of Regulations 105.

tion of Facts with Respect to Issues
9 as to Which the Parties Are Still in
e.

ies hereby submit to the Court for its
e issues set forth in subparagraphs (8)

1. On January 29, 1932, the decede
a Declaration of Trust naming the C
tional Trust and Savings Bank of L
as trustee and said Bank accepted sai
ferring to it as Trust Number 6969. A c
Declaration of Trust is attached hereto
1-A.

2. The decedent transferred assets t
as follows:

a. On January 29, 1932, decedent tra
the trust, assets (other than life insu
tracts) having a value on the date of
death of $152,951.83. After June 6,
dent transferred to said trust, assets
life insurance contracts) having a va
date of decedent's death of $130,81
amount, it is stipulated and agreed, in
is properly includible in decedent's g
(and which represents $28.81 more than
reported in the estate tax return on
such assets).

b. Decedent also transferred to said
insurance contracts owned by him, copi
are filed herewith as Exhibits, as follo

Policy Number	Name of Issuing Insurance Company	An
4,330,590	Mutual Life Insurance Company	$
10,484,859	New York Life Insurance Company	$
10,484,860	New York Life Insurance Company	$
10,541,918	New York Life Insurance Company	$
62,036	Peoples Life Insurance Company	$
63,287	Peoples Life Insurance Company	$
10832S-R	Indianapolis Life Insurance Co.	

ient executed by decedent on the dates said instruments and delivered by dece- d trustee on said dates. The total pro- id life insurance contracts, as of the date t's death, were $188,275.31, of which the ocable to premiums paid prior to Jan- 941, was $148,805.10, and the portion o premiums paid after said date was which latter sum, it is stipulated and in any event, includible in decedent's e (and which represent $62.63 more than t reported in the estate tax return on said insurance).

et forth in the Declaration of Trust (Ex- Article VII), the net income of said o be paid to Myron Selznick. Attached Exhibit 11-K is a statement showing the amounts of all payments made by the der said trust to Myron Selznick, from creation of the trust to the date of dece- h. On the date of decedent's death there 36 of income of said trust on hand with e which had accrued and which had not buted to the decedent.

hereby stipulated and agreed that, de- on the Court's decision with respect to as shown below, the amounts includible state on account thereof will be as fol-

includible in gross estate, the amount in
gross estate on account of said trust
(which is $91.44 more than the amount i
account thereof in the estate tax return)

b. If the Court finds that the non-in
sets transferred to the trust prior to Ju
are not includible in gross estate but th
insurance contracts transferred to the
to June 6, 1932, are includible in gr
then the amount includible in gross est
count of said trust is $319,093.10.

c. If the Court finds that all of the a
ferred by decedent to said trust (incl
non-insurance assets and insurance con
includible in gross estate, the amount in
gross estate on account thereof is $472,04

Dated November 29, 1948.

/s/ LUCIEN W. SHAW,
Counsel for Petitio

/s/ CHARLES OLIPHAN
Chief Counsel, Bureau of Internal Reve
sel for Respondent.

Filed Nov. 29, 1948. T.C.U.S.

EXHIBIT 1-A

s National Trust & Savings Bank
Trust No. 6969
Declaration Of Trust

l Men By These Presents: That the
tional Bank of Los Angeles, a national
ociation, with its principal office at Los
lifornia, hereinafter called Trustee, does
it, certify and declare that Myron Selz-
dent of Beverly Hills, California, here-
ed Trustor, has conveyed, transferred
ed to the said Trustee the sum of One
housand and ($100,000.00) Dollars lawful
ne United States, hereinafter sometimes
as "money and/or securities"; that in
ereto, the said Trustor has assigned to
Trustee, as Trustee, certain insurance
schedule of which is attached hereto,
hibit "A", and by this reference made
of as if herein fully set forth.

eed that no consideration was given by
e for the delivery to it of said sum of
or said securities, and that the same has
ived and accepted by it and will be here-
by it in trust, under the terms and con-
forth in this Declaration, and that the
any and all of said policies of insurance.
any other policies upon the life of the

ing uses and purposes, and subject to the
and reservations and upon the trusts
to-wit:

Article I.

It is an express condition of this trus
Trustee shall not be responsible nor as
liability for the nature, value or extent
to any sum of money, securities or othe
accepted In Trust hereunder, or any secu
or other property that may hereafter be
to it and added to this trust, as hereinafte
nor for any adverse or conflicting claims
therein of other persons, nor for the valu
or collectibility of any securities or note
paper received by it; but that its only lia
be for such right, title and interest as it
received or hereafter acquire under ar
ances, assignments and transfers, and for
as it may collect from any property rece

Article II.

The Trustor agrees that as to the
policies delivered to the Trustee or which
after be delivered to it:

To cause each and every policy inte
made subject to this agreement and
hereunder to be made payable to the
sufficient designation as beneficiary the
such other manner as the parties heret
insurer shall agree, and the Trustee a

agreement by which any policy shall
vable to it.

Article III.

tee is authorized and empowered to re-
d, subject to the provisions hereof, said
ney and securities, and also any addi-
rty and/or securities the Trustor may
time add to the principal of this trust,
of the trust estate and not at the risk
ee, and without liability for decrease in
f such property or securities. Said
ereby given full power of sale and ex-
nnection with the property and securi-
ne to time comprising the principal of
nd is authorized and empowered from
, subject to the restrictions hereinafter
nvest, reinvest, loan and reloan the pro-
sh principal in any securities, properties
ents permissible by law for investment
ds, and upon such terms and conditions
Trustee may deem to be for the best in-
is trust; said Trustee to use reasonable
o protect all persons interested in this
oss by reason of such loans or invest-

ne lifetime of the Trustor, Myron
sale or exchange of property which may
comprise the principal of the trust

Trustee except on the written order and
said Trustor or his duly authorized agen
said Trustor during his lifetime hereby
himself and/or his agent to be desig
time to time, the right to direct, in w
Trustee as to the investment of all cas
in any securities and/or property whe
the same may be approved and permiss
for investment of trust funds under the
State of California. After the death
said Trustee shall only sell, exchange,
reinvest in securities permissible by law
ment of trust funds as above provide
written approval of any two of the Tru
O. Selznick and Loyd Wright, and upo
of either the said David O. Selznic
Wright, then upon the approval of the
them; and/or if all of the above nam
should have previously died and/or
neglected to act within a reasonable tim
request of said Trustee, then in the a
uncontrolled discretion of said Trustee.
shall be fully protected in respect of an
changes, investments and reinvestments
directed by the Trustor and/or the
O. Selznick and Loyd Wright, and it s
liable or responsible in any way for d
or loss incurred by reason of any suc
changes, investments or reinvestments
standing anything herein to be con

rpus or said trust estate in any securi-
ritten by the said Trustee, or in which
ıstee is directly or indirectly interested.
r hereby reserves the right by written
filed with the Trustee, to revoke said
: of David O. Selznick and/or Loyd
l to substitute other persons to act for
of David O. Selznick and/or Loyd
the capacities herein in this paragraph
r them to act.
tee may, if it so elects, cause any and
corporate stock, now or that may here-
e subject to this trust, to be transferred
ne of the Trustee, as Trustee under its
969, and either name the beneficiaries in
e certificate and/or furnish said corpor-
he names of the beneficiaries and/or a
y of the Declaration of Trust; or hold
te stock in this trust without transfer
e, and/or it may hold the same in the
Trustor and/or the name of the bene-

nds accruing on shares of the capital
corporation which form a part of the
the trust estate and payable in shares
rporation, shall be deemed principal.
Trustee shall have the option of re-
vidend either in cash or in shares of
g corporation, it shall be considered

choice made by the Trustee. All rights to
the shares or other securities or oblig
corporation accruing on account of th
of shares in such corporation and the
any sale of such rights, shall be deeme

Said Trustee is directed to charge a
on investments and to credit all disco
vestments against or to principal, as th
be, and not against or to income. In all
said Trustee is hereby vested with absol
controlled discretion and power to dete
shall constitute principal of the trust e
gross income therefrom, or net income a
distribution under the terms of this t
may also, at its discretion, and subject
taining the consent of the Trustor, if liv
said David O. Selznick and Loyd Wrigh
be dead, or if they be dead, then in it
alone, improve any real property sub
trust, build, alter, or repair any im
thereon, of such character, amount, cos
such funds or property subject to this
may deem advisable.

Said Trustee may loan or advance its
to the trust estate, for any trust purpose
ing rates of interest, which loan or a
shall thereupon become a first lien on
trust estate as to both principal and inc
repaid to said Trustee before any othe

Article IV.

rustee hereunder shall resign under the
do which it hereby expressly reserves for
its successor or successors in office, the
Trustee shall be appointed by any court
ent jurisdiction in the County of Los
alifornia, acting upon or in response to
n of the resigning Trustee and/or the
living, and/or any beneficiary.

Article V.

ts hereunder created and declared shall
to the following conditions and agree-

the extent that it shall be deemed
y the Trustee to disclose the contents of
ent to any insurance or other company
es for any purpose of the trust, or in
f any proceedings in any court of com-
sdiction to enforce any of the provisions
eement or to appoint another Trustee,
controversy effecting this trust, the
ives the provisions of Section 103 of the
f the State of California and any similar
ter enacted or declared.

ny provision of this agreement shall be
id, such invalidity shall be without effect
f the other provisions hereof, and each
alid provision and agreement hereunder

passing of any interest in the trust esta
paid out of the principal of the taxabl
interest. All other taxes payable shall b
of principal and charged by the Truste
discretion it deems fair and equitable.

(d) Whenever the trust estate or a
thereof shall be distributable, the Trus
discretion, may transfer and deliver to
ficiary in the form in which then hel
estate, securities and investments at the
market value thereof equivalent in amo
distributable share or interest, or may c
trust estate or any part thereof into ca
tribution.

(e) In all matters of interpretation,
necessary to give effect to any provisi
agreement, the masculine shall include th
and the singular shall include the plural.

(f) This trust has been created, de
accepted by the Trustee in the State of
and shall be interpreted and enforced in
with the laws of said State.

(g) The terms "policy" and "policy
surance," whenever used in this agreer
include all forms of insurance upon the
Trustor, including accident insurance
the event of his death.

(h) Each and every beneficiary of
hereunder created and declared, incl

ir, or encumber his or her beneficial
l interest in the trust estate, and no in-
of attempted assignment, transfer, or
on thereof shall be effective for any pur-
ever, and neither the principal nor the
the trust estate, nor any part thereof,
ble for the debts of any beneficiary nor
o attachment, execution or other process
t.

s agreed that the Trustee shall not be
for any act or omission hereunder unless
itutes gross negligence, nor shall it be
bring or defend suit hereunder, unless
to its own satisfaction.

hall be the duty of every beneficiary to
Trustee is directed to make payment or
of any kind hereunder to notify the
the happening of the event or events
uch beneficiary becomes entitled to re-
and to furnish reasonable proof thereof.
Trustor warrants, represents and states
olvent and that there are no judgments
, and that he has created this irrevocable
ut intent to hinder, delay or defraud any
at, in so far as the provisions hereof may
at the income shall be payable to the
shall, for the purposes of the provisions
laration of Trust and as to said income,
and construed a beneficiary.

estate or from the principal thereof, if t
is insufficient, the Trustee shall first pa
charge, as and when due, any and all tax
ments, advancements and other expenses
kind and nature expended or incurred in
agement and protection of the trust esta
this trust, and the payment when du
and all income taxes, inheritance taxes
taxes levied or assessed upon the trust est
the beneficiaries hereunder or the income
and shall, after sufficient cash or other
have been deposited in this trust so that t
therefrom shall be sufficient, (until such
Trustor agrees to pay said premiums him
pay any and all premiums on life insuran
and/or contracts which may be transferr
delivered by the Trustor to the Trustee
to the terms hereof, and also pay to itself
sation for its own services as Trustee, as

(a) A sum equal to one-tenth of one
(1/10th of 1%) of the reasonable value o
estate for the acceptance of this Decla
Trust and other instruments in relation h
a like sum for any additions that may be
made to the principal of this trust. Mi
Twenty-Five Dollars ($25.00).

(b) An annual compensation, payable
equal to three-fifths of one per cent (3/5
the reasonable value of the principal of

sum equal to one per cent (1%) of the value of the principal of the trust estate mination, distribution, closing and settle- s trust according to the terms hereof. reasonable compensation for any unusual linary services rendered by it as Trustee to be fixed by court.

Article VII.

st is irrevocable. The entire net income d derived from the trust estate and avail- istribution hereunder shall be by said d monthly or in other convenient install- rected by the Trustor to Myron Selznick ing his lifetime; the said Myron Selznick, eserves the right to direct the Trustee to time to credit, keep and add any and which, pursuant to the terms hereof, may to him, to the principal of the corpus of tate, by giving written instructions from e so demanding.

Article VIII.

d after the death of the said Myron ne entire net income received or derived rust estate and available for distribution shall go and be paid by said Trustee in hly installments, as follows:

long as the net distributable income re- the corpus of the trust estate does not

1. One-half (½) of the net income sha
able to the widow of the Trustor, if livi
the issue of the body of the Trustor surviv
and share alike. In this connection, th
guardian surviving of the issue of the bo
Trustor shall, during the minority of any
receive the share herein provided to be
issue during his or her minority.

2. Of the remaining one-half (½) o
income, for and during the lifetime of t
and father of the Trustor, Fifty Per ce
of said remaining one-half shall be p
monthly installments to each of L. J. Sel
father of Trustor, and Florence A. Sel
mother of Trustor, and upon the death of
them the survivor of the said father and
the Trustor shall receive, during his or he
all of the one-half of the net income her
sub-paragraph 2 referred to. The Trusto
no provision herein for his brother Dav
brother Howard and his family, during t
either his father and/or mother, for the r
he has full faith and confidence in the fac
mother and father will should necessity r
they have always done, amply provide fo
David and the said Howard and his fam
the moneys they receive from this trust.

Upon the death of the last survivor o
mother and father of the Trustor, the
one-half of the net income referred to in

0%) Per Cent thereof to David O. Selz-
ner of Trustor, and the remaining fifty
r cent to Howard Selznick, the brother
, and the children of Howard Selznick,
share alike, subject to the following con-
s to Howard Selznick, as long as he shall
the children of Howard Selznick as long
all remain single, during the life of this
n any child of Howard Selznick marry-
uch child shall be entitled to receive his
are of said income for one year there-
er the expiration of one year from the
h child's marriage, he or she shall have
interest in the income, as provided in
raph. The share of the net income to be
the surviving children of the said Howard
hall, during their minority, at all times
to the guardian of the estate of each of
en. When and as each of the children of
rd Selznick marry, she or he shall be
the Trustee Twenty Five Hundred
Dollars, from the principal of the
the trust estate, which shall be charged
at portion of the principal from which
oward Selznick and his children receive
of the net income of the corpus of the
. (In this connection, Trustor states that
Howard, at the date of the execution of
has two children, Ruth Selznick and

in contemplation of the fact that said Hov
nick may have other issue of his body.)
death of the said Howard Selznick, or a
children, the income to which the one so
would be entitled, if living, shall, during
time of the survivor or survivors, (subj
qualifications hereinafter set forth), be
such survivor or survivors. In this conne
withstanding anything herein in this do
the contrary, the children of the said Hov
nick, upon marriage, shall be entitled
their share of the income herein provi
paid them, for one year after his or
riage only, and upon the termination of
year period, that portion otherwise p
such child as shall have married, sha
tributed to the said Howard Selznick and
of his children who may then survive a
married, and upon the expiration of the
year period for the last of said children o
Selznick who may marry, and upon the de
said Howard Selznick, or upon the death
survivor of the said Howard Selznick an
dren should they not marry, or any of
marry, the income herein provided to be p
said Howard Selznick and/or his childre
paid to the widow of the Trustor, if she
if not, to the daughter of the Trustor, J
nick, and/or if he leaves more than one is
body to his issue (including Joan Selzni

e death of the said David O. Selznick, that
the net income hereinbefore provided to
him shall likewise be payable to the said
Trustor, and if she does not survive the
O. Selznick, then to the child or children
Trustor, share and share alike, if there
an one.

d after the death of the widow of the
she survives him, and/or if she prede-
stor, then upon the Trustor's death, one-
of the net income of the corpus of the
e (and balance of income of the corpus
st estate if she then be receiving or be
the same pursuant to the terms hereof),
yable to Joan Selznick, daughter of the
, if there be more than one issue of the
e Trustor surviving, then to his issue
share alike, until the death of the last
David O. Selznick, Howard Selznick, L.
, Florence A. Selznick, Ruth Selznick,
ce Selznick, and upon the death of the
or of them the trust shall cease and de-
l the principal and undistributed income
yable as follows:

(a) To the issue of the body of Myro
Trustor, share and share alike, and to t
of any deceased issue per stirpes and b
of representation.

(b) If there be no such issue as refe
the foregoing sub-paragraph 2, to the
named charitable institutions, to-wit: L
Orthopedic Hospital for Children.

The Trustor reserves the right to cha
stitute, from time to time, the said chari
tutions, by giving notice of such change
tution to the Trustee in writing.

Notwithstanding anything herein to th
if and in the event the said Trustor di
leaving surviving a widow, and in the
Selznick and any other issue of the body
Selznick shall predecease David O. Selzn
Howard Selznick and/or Ruth and Flo
nick, and the said Joan or other issue
Selznick leave no issue, then the net inco
from the said trust estate shall be distr
paid as follows:

(a) The whole of the net income shall
to L. J. Selznick and Florence A. Selz
and share alike, or the survivor of th
their lifetime.

(b) Upon their death, and so long a
Selznick survives, Fifty ($50.00) Dollar
to each of said Howard Selznick and h
share and share alike, and the balan

n the death of Howard, if David sur-
y ($50.00) Dollars per week to each of
ng children of Howard Selznick, during
ne, subject to the qualification, however,
y of the children of Howard Selznick
y, then the share of the income received
ld or children as does marry shall only
period of one year after his or her mar-
thereafter the portion of the income to
child or children would otherwise have
ed shall go to David O. Selznick, and
rther, that the balance and remainder of
come, after deducting the Fifty ($50.00)
ments to Howard and the survivors of
, subject to the foregoing qualifications,
se go and be paid to David O. Selznick,
ne survives them.

David O. Selznick predeceases them, the
shall be payable to the said Howard
children, or the survivor of them, share
alike, during their lifetime, and upon
of the last of the survivor of Howard
d his children the trust shall cease and
and the principal and undistributed in-
e trust estate shall be made payable and
e Trustee be transferred, set aside, and
o the following named charitable insti-
wit: Los Angeles Orthopedic Hospital
n.

tutions, by giving notice of such change
tution to the Trustee in writing.

Notwithstanding anything herein to the
if and in the event the net income from
estate exceeds an average of Fifteen
($15,000.00) Dollars per year, but does
Thirty Thousand ($30,000.00) Dollars a
income per year, then and in such event
foregoing provisions shall be changed in
ing particulars, and in no others, to-wit:

The children of Howard Selznick shall e
upon their marriage Five Thousand
Dollars instead and in lieu of Twenty
dred ($2,500.00) Dollars each, and they
ceive Fifty ($50.00) Dollars per week
the net income hereinbefore provided for
under such circumstances and at the times
they are hereinbefore provided to receive
tion of said net income. Notwithstanding
herein to the contrary, the surplus over
an average annual income of Thirty
($30,000.00) Dollars per annum derived
trust estate and all such surplus shall b
as follows:

(a) To the widow of the Trustor, d
lifetime.

(b) Upon her death, to Joan Selzni
survives, and other issue of the body of M
nick, if any there be and if any survive,

here be no widow of the Trustor sur-
all issue of the Trustor shall die without
e, then said surplus shall be paid to L. J.
nd Florence A. Selznick, father and
pectively, of the Trustor, if living, or
vivor of them, and thereafter to the
vid O. Selznick, if living, and upon his
be accumulated and added to the princi-
rust estate.

Article IX.

anding anything herein to the contrary,
tention, desire, and the Trustor hereby
t if and in the event, and under any
e, his legal wife survives him as his
after his death she should remarry,
d all income herein provided to be paid
e divided and she shall receive one-half
of the moneys, (either income or prin-
n and as, pursuant to the terms hereof,
ed to receive the same, and the remain-
f of such principal and/or income here-
ovided to be paid her shall be paid
ributed in the same manner as is here-
ovided in the event the wife of the
ll have predeceased the Trustor.

Article X.

tor declares that he is married; that his

Selznick. Trustor wishes to provide, ho
makes this Declaration of Trust in con
of the fact that there may be more than
of his body, and for that reason has throu
instrument made provision for the said J
of her interest herein with any other is
body, share and share alike.

Article XI.

Notwithstanding the fact that this Dec
Trust is irrevocable, the Trustor, for h
on behalf of the beneficiaries, reserves t
petition any court of competent jurisdict
time and from time to time to amend a
strue the same; provided, however, that
ment shall change the provisions of this t
shall have the effect or which is intended
cause the same to be construed to be or a
be a revocable trust rather than an irrev

The Trustor reserves the absolute righ
or cause to be cancelled, and revoke or
revoked, any of the insurance policies
ferred to, or which may hereafter be ad
Trust, provided that he first obtain the w
sent of any two of the following, t
Trustee, David O. Selznick and Loyd W
vided further, that upon any cancellatio
surrender values received on any such po
remain in and/or be added to the corp
Trust.

Article XII.

tanding anything herein to the contrary, nall terminate upon the death of the last the Trustor, Marjorie Daw Selznick, ck, David O. Selznick, Howard Selznick, ick, father of the Trustor, Florence A. other of the Trustor, and Ruth and Flor- ck, nieces of the Trustor, all of whom ing, and the trust estate distributed as e provided.

Article XIII.

me accrued or undistributed at the ter- f any trust or estate hereunder, shall go to the beneficiary or beneficiaries he next eventual estate, in the same pro- the principal hereof, provided, however, n express condition of the trust herein ich shall take precedence over any and ovisions herein relative to the distribu- trust estate, that the Trustee is author- npowered and may in its sole and abso- ion, although it is not obligated so to do, et income and/or principal of the trust n such manner as to it may seem equit- ust, pay a reasonable sum toward de- ner in whole or in part the expenses of ness and of the funeral of the Trustor specifically named or contingent bene-

Article XIV.

Wherever in this agreement it is pro
the Trustee shall cease making payme
beneficiary upon the happening of any c
such as marriage or otherwise, it shall n
or responsible by making payment pursu
terms of this trust to any beneficiary or
son interested in this trust, until notified
and due proof satisfactory to the Trus
happening of such contingency as pursu
terms hereof operates to change the paym
tofore in effect.

In Witness Whereof, said Citizens
Trust & Savings Bank of Los Angeles,
has caused its corporate name to be subs
its corporate seal to be affixed hereunto
President and Assistant Trust Officer
duly authorized, this 29 day of Januar
Los Angeles, California.

CITIZENS NATIONA
& SAVINGS BANK
ANGELES, as Trust
By HALCOTT B. THOM
Vice-President.
VICTOR T. JOHNSO
Assistant Trust Of

I, the Undersigned, Myron Selznick,
tify that I am the person named in the
foregoing Declaration of Trust, and the

st is irrevocable; that said Declaration
ly and accurately sets out the terms and
and upon which the property therein
s to be held, managed and disposed of
stee therein named, and I do hereby
nt to, approve, ratify and confirm the
particulars.

Los Angeles, California, this 29 day of
32.

MYRON SELZNICK,
Trustor.

dersigned, Marjorie Daw Selznick, wife
elznick, the Trustor in the above and
eclaration of Trust, having read said
of Trust in its entirety and clearly
ng the same, do hereby accept the terms
ns of said trust, and I do hereby ratify,
confirm the same, and that I, by this
do, pursuant to my right to contract,
quish and forever quitclaim any and all
and to the moneys and securities de-
hereafter to be deposited by the said
nick in said Trust, and/or other prop-
rities, including insurance agreements,
aid thereon, as well as the proceeds
en and as collected, and that each, all
f the moneys, property, securities, in-
icies, and the proceeds thereof, I do

be constituted as a waiver of any right
may have by reason of the terms and co
said Trust, if any.

Dated at Los Angeles, California, this
January, 1932.

MARJORIE DAW SI

EXHIBIT "A"

No. 192324

The Indianapolis Life Insurance
Company of Indianapolis, Indiana

No. 62036

Peoples Life Insurance Company.

No. 63287

Peoples Life Insurance Company.

No. 10484859

New York Life Insurance Company

No. 10484860

New York Life Insurance Company

No. 4330590

The Mutual Life Insurance Com
pany of New York .....

No. 10541918

New York Life Insurance Company

Policies taken out since the above ex
made out

No. 109395

The Indianapolis Life Insurance
Company of Indianapolis, Indiana

EXHIBIT 11-K

f Payments of Net Income to Myron
from Trust Number 6969, made by
National Trust and Savings Bank of
geles as Trustee.

	Amount of Payment
.....	$ 431.34
1933	1589.04
33	1624.21
, 1933	811.03
1933	819.47
1934	146.97
4	2410.62
934	1422.41
, 1934	1334.95
1934	1262.59
1934	459.22
1935	2448.77
35	716.00
.....	1879.53
935	2376.99
, 1935	544.65
1935	436.68
1935	1571.99
1936	23.98
1936	714.90
.....	480.00
	100.00

September 3, 1936 .....
September 21, 1936 .....
October 7, 1936 .....
November 6, 1936 .....
January 9, 1937 .....
February 5, 1937 .....
March 3, 1937 .....
May 5, 1937 .....
July 6, 1937 .....
August 6, 1937 .....
September 3, 1937 .....
April 11, 1940 .....
June 5, 1940 .....
November 8, 1940 .....
March 18, 1942 .....

Tax Court of the United States

Docket No. 14985

OF MYRON SELZNICK, Deceased, OF AMERICA NATIONAL TRUST AVINGS ASSOCIATION, DAVID O. ICK and CHARLES H. SACHS, Ex-

Petitioners,

vs.

ONER OF INTERNAL REVENUE, Respondent.

rty transferred to a trust under which estate in the income was reserved to or is includible in the gross estate of donor under section 811 (c), I.R.C. s L. Church, ... U.S. ... (January 17,

. SHAW, ESQ.,
Petitioners.

ES, ESQ.,
respondent.

EMORANDUM OPINION

Judge.

ndent determined a deficiency in estate ,634.05 consequent upon his holding,

The parties entered into an extensive
by which numerous issues were dispose
stipulation is incorporated herein by re
adopted as formal findings of fact. Ef
given to such stipulations in the recompu
sequent hereon. The following facts were
or appear from the pleadings:

Bank of America National Trust and S
sociation, a national banking association
Selznick and Charles H. Sachs are th
pointed and acting executors of the la
testament of Myron Selznick, who died
23, 1944.

The Federal estate tax return of the es
decedent was duly filed with the collect
nal revenue for the sixth district of Ca
June 22, 1945, and the sum of $294,099.9
to said collector on said date as Federa
of said estate.

On January 29, 1932, the decedent exec
laration of Trust naming the Citizen
Trust and Savings Bank of Los Angele
and said bank accepted said trust, refe
as Trust No. 6969.

Article VII of the trust agreement re
lows:

This Trust is irrevocable. The ent
come received and derived from the
and available for distribution hereund

nick for and during his lifetime; the
Selznick, however, reserves the right
Trustee from time to time to credit,
d any and all income which, pursuant
hereof, may be payable to him, to the
the corpus of the trust estate, by giv-
instructions from time to time so de-

eads as follows:
anding the fact that this Declaration
irrevocable, the Trustor, for himself
alf of the beneficiaries, reserves the
ition any court of competent jurisdic-
time and from time to time to amend
rue the same; provided, however, that
nt shall change the provisions of this
shall have the effect or which is in-
shall cause the same to be construed
end it to be a revocable trust rather
vocable one.
or reserves the absolute right to can-
to be cancelled, and revoke or cause
d, any of the insurance policies herein
or which may hereafter be added to
provided that he first obtain the writ-
of any two of the following, to wit:
David O. Selznick and Loyd Wright;
rther, that upon any cancellation any
der values received on any such poli-

The decedent transferred assets to sa
follows:

On January 29, 1932, decedent transf
trust, assets (other than life insurance
having a value on the date of decedent
$152,951.83. After June 6, 1932, dece
ferred to said trust, assets (other than
ance contracts) having a value on the
cedent's death of $130,817.79, which ar
stipulated and agreed, in any event is p
cludible in decedent's gross estate (and
resents $28.81 more than the amount
the estate tax return on account of suc

Decedent also transferred to said tr
surance contracts owned by him, as fo

Policy Number 4,330,590, Mutual Life
Company, $25,000.

Policy Number 10,484,869, New Yor
surance Company, $25,000.

Policy Number 10,484,860, New York
ance Company, $25,000.

Policy Number 10,541,918, New York
ance Company, $50,000.

Policy Number 62,036, Peoples Life
Company, $25,000.

Policy Number 63,287 Peoples Life
Company, $5,000.

Policy Number 108,328-R, Indianapol
surance Company, $10,000.

umber 109,395, Indianapolis Life Insur-
any, $5,000.

to the life insurance contracts are true
instruments of assignment executed by
n the dates shown on such instruments
ed by him to the trustee on such dates.
proceeds of said life insurance contracts,
ate of decedent's death, were $188,275.31,
he portion allocable to premiums paid
nuary 10, 1941 was $148,805.10, and the
ocable to premiums paid after said date
0.21, which latter sum, it is stipulated
, is in any event, includible in decedent's
(and which represent $62.63 more than
reported in the estate tax return on ac-
id insurance).

rth in the Declaration of Trust, the net
said trust was to be paid to Myron Selz-
ched thereto is a statement showing the
amounts of all payments made by the
ler said trust to Myron Selznick, from
creation of the trust to the date of de-
ath. On the date of decedent's death
$1,138.36 of income of said trust on hand
rustee which had accrued and which had
stributed to the decedent.

so stipulated if the Court finds that all
ts transferred by decedent to said trust
both non-insurance assets and insurance

On the above facts and others appea
stipulation and exhibits, petitioners on
tend that none of the assets transferred
should be included in the taxable estate.

The brief was filed but a few days bef
preme Court rendered its decision in Co
v. Estate of Francois L. Church, Decease
(January 17, 1949). In that case th
Court overruled May v. Heiner, 281 U.
Hassett v. Welch, 303 U.S. 303, and rul
closely paralleling in all substantial res
here present that the reservation of life
a decisive factor. The Court said:

***We hold that this trust agreement,
reserved a life income in the trust prope
tended to take effect in possession or en
the settlor's death and that the Commissi
fore properly included the value of its
the estate.

No useful purpose will be served by di
the various technical and legalistic argu
vanced by petitioners in view of the
effect thereon of the Church case. Res
affirmed.

Decision will be entered under Rule 5

Served April 1, 1949.

Entered April 1, 1949.

[Seal T.C.U.S.]

ourt and Cause.]

TO WITHDRAW MEMORANDUM
ION AND TO PERMIT FILING
ETITIONERS' SUPPLEMENTARY
F

w the petitioners by their attorneys
ossaman and Joseph D. Brady, Walter
an and Lucien W. Shaw, and respect-
st that the court enter the following

memorandum opinion herein entered
1949, be withdrawn and that the peti-
plementary brief to analyze the Church
ubmitted herewith) be filed.
reasons therefor petitioners respectfully
the court as follows:
oners' Opening Brief was filed on or
ary 10, 1949, within the time directed by
t the trial of the case on November 29,

ebruary 2, 1949 this Court granted a
respondent for extension of time within
e brief. Included in said motion as one
unds therefor was the following state-

Supreme Court of the United States
inions promulgated January 17, 1949,
ner of Internal Revenue v. Estate of
Church, Deceased, Edward E. Bla-

Spiegel et al v. Commissioner of Interna
decided questions which in all probability
a material bearing on the decision in thi
ing and respondent desires to give the ap
of the decisions in these cases careful con
which consideration cannot be given in th
maining before the due date of the brie

3. Petitioners therefore assumed that t
case would be considered in connection
and that the appropriate time for peti
present to the Court their views thereon
in petitioners' reply brief to respondent'
ferred to in said motion.

4. Respondent has never filed a brief h
before petitioners were able to submit
mentary brief to analyze the Church de
memorandum opinion herein was receive

5. Petitioners respectfully submit that
sion in the Church case has no applicati
case. The reasons for this conclusion are
forth in the supplementary brief acco
this motion. The Court should have the
petitioners' argument on this matter b
decision is entered herein.

Wherefore, it is prayed that the forego
be made by the court.

Dated: April 11, 1949.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAM

States Tax Court Stamp]: Denied April

/s/ ERNEST H. VAN FOSSAN,
Judge.

and Filed April 13, 1949 T.C.U.S.

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ourt and Cause.]

FOR REVIEW BY THE COURT
REPORT OF A DIVISION

siding Judge Of The Tax Court Of the
States:

rs respectfully pray that the Presiding
cise the discretion conferred on him by
(b) I.R.C. and direct that the Memoran-
on entered in the above proceeding on
49 be set aside and that the matter be
the entire court.

issue in this case is whether a trust
nuary 29, 1932 is includible in gross
Federal estate tax purposes. This issue
ends upon whether the trust is taxable
grantor reserved income of the trust
l ending before his death.

ion for review is based upon the follow-
:

tioners, through no fault of their own,
ed no opportunity whatsoever to present

basis for the Memorandum Opinion of th
entered April 1, 1949.

(2) The Memorandum Opinion of th
entered April 1, 1949 is erroneously base
the citation of the decision in the Ch
(January 17, 1949; 93 Law Ed. Adv.
which case actually has no relationship t

1. Petitioners Given no Opportunity t
Arguments on Basis of Memorandu

In accordance with the order of the C
trial, the petitioners' opening brief was f
on or about January 10, 1949.

Seven days later, on January 17th, th
Court entered its decision in the Church
titioners were aware that the Church deci
be thought to have some bearing on this
was confirmed by respondent's Motion
sion of Time to File Brief (granted b
Court on February 2, 1949). This M
based on the plea that the Church dec
rendered would have some bearing on th

Petitioners' counsel promptly ana
Church decision. They reached the concl
the decision was not applicable and had
upon this case and could not be used as
decision against the petitioners. They
pared a draft of language for a brief
strate this point long before the decisi
Division herein.

his argument on the Church case was in
ef to respondent's brief. At the date of
ivision had ordered respondent to file a
had ordered petitioners to file a reply
seemed presumptuous for petitioners'
file a further interim brief not directed
rt when there was no need to do so. The
reply brief was the proper occasion for
s point.

rs received no brief of the respondent
it was due and attempted, without suc-
gh the Clerk of the Court to find out

rs were therefore astounded, shortly
1, 1949, to receive the Memorandum
the Division, deciding the case solely in
the Church decision. The Church de-
nothing to do with this case and peti-
been ready, able and willing to demon-
conclusion for over a month before the
m Opinion was entered. The opportun-
o was wholly denied to them through
oration between the respondent (who
knew it was unnecessary for him to file
d the Division which entered this Mem-
pinion without giving petitioners the
ortunity to be heard on this question.

rs therefore respectfully urge that they
l the opportunity to be heard on the

guilty of no fault or negligence whats
merely because they adhered to the or
cedure of this Court instead of voluntee
terim brief on a question arising after t
their opening brief.

Since this issue involves a tax of ov
plus interest, the petitioners feel that
thus deprived of a fair hearing on an
matter by this Court.

It is therefore respectfully requeste
Presiding Judge set aside this arbitrary
dum Opinion and have this case conside
entire Court where petitioners' argume
sole point relied upon in the Division
may be examined.

2. Church Case has no Application Her

The Memorandum Opinion of the Di
tered April 1, 1949, relies solely upon t
of the Church case. Neither the facts r
cision in the Church case have any
herein.

The statute applicable to this case
302(c), as amended by the Joint Res
March 3, 1931 (quoted in our opening br
16 and in our supplementary brief on pa

As amended by the Joint Resolution o
1931, the statute provided for taxing a tr
thereafter if the decedent reserved the r
income for life. Under this 1931 amend
had been applicable, which it was not, t

rust in the present case decedent re-
imself the right to income to be "paid
in other convenient installments as di-
he trustor." (Exhibit 1-A, Article VII,
page 26 of our opening brief.) The trust
ovided that the accrued and undistrib-
e of the trust at decedent's death should
d go to the beneficiary or beneficiaries
the next eventual estate." (Exhibit 1-A,
II, quoted on page 26 of our opening
erscoring supplied.)

tention from the beginning of this case
hat this was not a trust with income re-
life. It was a trust with income reserved
iod ending on the date of the last pay-
installment of income prior to decede
, which is not a right to income for life.
ad been a trust with income reserved for
unquestionably taxable under the ap-
tute—the Joint Resolution of March 3,
e is no question about this—there was no
out it from the beginning of this case
ior to January 17, 1949, the date of the
the Church case.

rch case involved a trust created in 1924
he decedent reserved the net income of
'during the term of his natural life."
nothing in the Church trust limiting the
of income to any period ending before

Revenue Act of 1924) provided only for
transfers "intended to take effect in po
enjoyment at or after his death." The Co
fore, in the Church case, was holding
this language the reservation of a full
made the trust taxable. If the Church
been created after the Joint Resolution
3, 1931, it would clearly have been ta
there would have been no occasion to tak
ter to the Supreme Court of the United

The Church decision thus merely estab
law prior to March 3, 1931 to be the sam
ways has been after March 3, 1931, nam
trust with full life estate reserved to the
taxable. We have never argued in this
this was not the law after March 3, 1931

What we have argued is that the Selz
did not create a full life estate. The
herein did not retain the right to the inc
trust for life but for a period ending
death. We have argued and still argue
prevents the trust from being taxable un
of law which taxes only trusts where th
income is reserved for life. The Church
nothing to this rule of law in our case,
a trust after March 3, 1931. Therefore,
ment stands wholly unaffected by the Ch
which merely extended back the rule a
plicable to trusts created after March 3

ıe here involved. (Section 302(c), as
y the Revenue Act of 1932, effective
32.) That this was the exact purpose of
ıent appears from both House and Sen-
:tee reports. (House of Representatives
708, 72d Congress, 1st Session; Senate
65, 72d Congress, 1st Session. See, C. B.
rt II, at pp. 490 and 532.) These Com-
orts are quoted from in our opening
29, and in our supplementary brief,
therefore is clear that such a trust could
ed if created before June 6, 1932.
nothing in the Church decision to affect
s of the facts in this case. The Church
ed a different set of facts. None of the
the Church opinion deals with taxabil-
he decedent reserves a right to income
d ending before his death.
refore submit that the Memorandum
wholly in error in relying upon the
ision as the basis for a decision herein.
ase has nothing to do with this situation.
herein can be based only upon a detailed
the provisions of the trust and the law
thereto, as was done in our opening

ons why the Church decision is not ap-
rein appear more fully in our Supple-
rief to Analyze Church Decision, filed

with the Court on April 13, 1949, which
sion refused to consider.

It is therefore respectfully urged that
orandum Opinion of the Division is in
that this proceeding should be reviewed
tire Court.

Dated: April 21, 1949.

/s/ JOSEPH D. BRADY,
/s/ WALTER L. NOSSAM
/s/ LUCIEN W. SHAW,
Attorneys for Peti

[U.S. Tax Court Stamp]: Denied Apri

/s/ BOLON B. TURNER,
Presiding Judge.

Received and filed April 25, 1949 T.C.U

[Title of Court and Cause.]

RESPONDENT'S COMPUTATION
ENTRY OF DECISION

The attached proposed computation is
on behalf of the respondent, to The Tax
the United States, in compliance with i
determining the issues in this proceedin

This computation is submitted in accord
the opinion of the Court, without prejud
respondent's right to contest the correctn

ered herein by the Court, pursuant to
in such cases made and provided.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue.

JEBLETT,
ION COUNSEL.
ROUTER,
ONJES,
cial Attorneys, Bureau of
nternal Revenue.

and filed May 3, 1949 T.C.U.S.

April 22, 1949.

Recomputation Statement

state of Myron Selznick, Deceased
ank of America National Trust and
Savings Association
avid O. Selznick and Charles H. Sachs,
Executors
69 North Beverly Drive
everly Hills, California

Docket No. 14985

March 23, 1944.

Estate Tax Liability

	Tax Assessed	Deficiency
	$294,099.92	$199,842.44 (*)

ents shown in the attached schedules have been
lance with the memorandum opinion of The Tax
nited States, entered April 11, 1949, for decision

piration of 60 days after the decision of The Tax United States becomes final, the deficiency of $199 above will be reduced to $136,822.66.

Estate of Myron Selznick
Date of Death: March 23, 1944

Recomputation Statement

Schedule 1
Adjustments to Net Estate

	For Basic Tax
Net estate as shown in statutory notice dated March 27, 1947	$1,794,519.34
Net estate as adjusted	1,378,434.18
Adjustment (decrease)	$ 416,085.75
Reductions in value and increases in deductions:	
(a) Stocks and bonds	
(b) Other miscellaneous property	
(c) Transfers	
(d) Debts of decedent	
(e) Taxes and administration expenses	
Total	

Schedule 2

Explanation of Adjustments

	Value determined in statutory notice
(a) Stocks and Bonds:	
(1) Item 22	$ 39,958.34
(2) Item 25	12,000.00
Total	$ 51,958.34
Difference (decrease)	

Schedule 2 (Continued)

on Selznick
March 23, 1944

Recomputation Statement

	Value determined in statutory notice	Revised determination
cellaneous Property:		
	$ 271,590.21	$ 137,774.00
	9,594.77	5,890.72
	200,000.00	20,000.00
ettlement with s)	6,500.00	3,250.00
laim against nat)	21,886.36	None
	$ 509,571.34	$ 166,914.72
		342,656.62
during decedent's life:		
	$ 283,769.62	$ 283,769.62
	188,275.31	188,275.31
	$ 472,044.93	$ 472,044.93

— none

The Tax Court of the United States that "prop-
to a trust under which the life estate in the in-
ved to the donor is includible in the gross estate
or under section 811(c) Internal Revenue Code."

	Allowance as shown in statutory notice	as revised
ecedent:		
	none	none
	none	$20,681.00
	none	$20,681.00
decrease)		$20,681.00

Mildred Selznick against the decedent's estate in
$27,575.00 is allowable as a deduction for federal
oses in the amount of $20,681.00.

Schedule 2 (Continued)

Estate of Myron Selznick
Date of Death: March 23, 1944

Recomputation Statement

(e) Federal and state income taxes and state p
and interest thereon accrued prior to the date of
death, and administration expenses incurred by t
claimed in the estate tax return nor allowed in the
are properly deductible in an amount of $33,589.79.

Schedule 3

Computation of Estate Tax

Net estate for basic tax, Schedule 1..		
Net estate for additional tax, Schedule 1		
Gross basic tax		
Credit for estate and inheritance tax		
Net basic tax		
Total gross taxes (basic and additional)	$	493,942.36
Gross basic tax		78,774.73
Gross additional tax		
Total net basic and additional taxes		
Estate tax assessed: July 1945 list, Page 102, Line 3....		
Deficiency		

urt and Cause.]

TION WITH RESPECT TO ENTRY
DECISION UNDER RULE 50

by stipulated and agreed by the parties
-entitled proceeding by their respective
llows:

ax Court may enter its decision based
ndent's computation for entry of de-
was filed with the Court on May 3,
arties reserving, however, the right to
correctness of such decision in the ap-
s as provided by statute.

event that evidence of payment of State
taxes is filed before the expiration of
r the decision of the Tax Court of the
tes becomes final the deficiency of
which is computed without reference to
ch State inheritance taxes, shall be ap-
reduced.

event that proceedings are had in the
urts, the deficiency above mentioned
ced still further in such amount as will
duction for legal fees and expenses in-
ch appellate proceedings, no deduction
ing been reflected in respondent's com-
d May 3, 1949.

spondent will, upon request, join peti-
equesting the Court of Appeals for the

out the provisions of paragraphs 2 an
stipulation.

Dated: May 23, 1949.

/s/ JOSEPH D. BRADY,

/s/ LUCIEN W. SHAW,
Counsel for Petiti

/s/ CHARLES OLIPHAN
Chief Counsel, Bu
ternal Revenue.

Filed May 31, 1949 T.C.U.S.

[Title of Court and Cause.]

DECISION

Under written stipulation signed by
the parties in the above-entitled proce
filed with the Court on May 31, 1949, a
ton, D. C., it is

Ordered and Decided: That there is
in estate tax of $199,842.44.

[Seal] /s/ ERNEST H. VAN FC
Judge.

Entered June 3, 1949.

Served June 3, 1949.

ırt and Cause.]

RDER AND DECISION

to the Court's Memorandum Opinion
l 1, 1949, the respondent filed a pro-
tation of tax on May 3, 1949, and a
lation signed by counsel for the parties
filed on May 31, 1949, now, therefore,

ıd Decided: That the decision entered
ne 3, 1949, be and the same is hereby
set aside, and it is further

ıd Decided: That there is a deficiency
of $199,842.44.

/s/ C. R. ARUNDELL,
Judge.

ıne 7, 1949.

ıe 8, 1949.

In the United States Court of Ap
For the Ninth Circuit

Tax Court Docket No. 14,985

ESTATE OF MYRON SELZNICK,
BANK OF AMERICA NATIONA
AND SAVINGS ASSOCIATION
O. SELZNICK and CHARLES F
Executors,

Petitioners on I

vs.

COMMISSIONER OF INTERNAL R

Respondent on I

PETITION FOR REVIEW

To the Honorable Judges of the Ur
Court of Appeals for the Ninth Circuit

Now come Estate of Myron Selznick
Bank of America National Trust and S
sociation, David O. Selznick and Charle
Executors, by Joseph D. Brady, Walte
man and Lucien W. Shaw, their atto
respectfully show:

I.

Nature of Controversy

Petitioners are executors of the Estat
Selznick who died a resident of Beverly
ifornia, on March 23, 1944.

On January 29, 1932, said decedent

vings Bank of Los Angeles as trustee
k accepted said trust.
y 29, 1932, said decedent transferred
assets (other than life insurance con-
g a value on the date of his death of
Decedent also transferred to the trust
irance contracts owned by him. The
e proceeds of said life insurance con-
the date of decedent's death) allocable
paid prior to January 10, 1941, was

dent in his 90-Day Letter determined
ansfers to said trust by the decedent
ble in gross estate for Federal estate
as transfers "intended to take effect
or enjoyment at decedent's death"
in the provisions of section 811 (c) of
Revenue Code."
have denied that said transfers were
ake effect in possession or enjoyment
death because all of decedent's rights
other possession or enjoyment of the
ended, under the terms of the trust,
date of decedent's death. Therefore,
rge, the transfers were not includible
e under section 302(c) of the Revenue
s amended by the Joint Resolution of
1 (Public Number 131, 71st Congress),
e law applicable to these transfers, nor

Petitioners have also asserted that sai
are not includible in gross estate under
provision of the Internal Revenue Code
respondent did not deny before the Ta
the United States.

The Tax Court upheld the determina
respondent that said transfers were in
gross estate. In doing so it relied solel
decision of the Supreme Court in Comm
Estate of Francois L. Church, Deceased
17, 1949), although that case involved
which the decedent had reserved a righ
for life ending only at the moment of
whereas in this case, under the trust, the
right to income ended before his death.
Court gave the petitioners no opportu
heard on the application of the Church c
that case was decided after petitioners
opening brief, and the Court entered
without waiting for a brief from the re
permitting the petitioners to file the
brief in which the Church case would
discussed.)

The Tax Court erred:

1. In holding and deciding that tran
cedent to said trust of $152,951.83 (wit
assets other than life insurance contra
$148,805.10 (with respect to life insu
tracts) were includible in the deced
estate for Federal estate tax purposes.

Federal estate tax based on including
rs in gross estate.
dering an opinion and decision which,
cts above enumerated, are contrary to
ng law and regulations and are not
any evidence in the case.

II.

of Court in Which Review Is Sought

s hereby declare that they seek a re-
decision of the Tax Court of the United
e United States Court of Appeals for
rcuit.

III.

to Establish Venue and Jurisdiction

znick, the decedent herein, died a resi-
erly Hills, California, on March 23,
state is being administered under the
State of California. The petitioners
of America National Trust and Sav-
tion, a national banking association,
lznick, and Charles H. Sachs, are the
ed and acting executors of the last will
nt of Myron Selznick. This case in-
ederal estate tax liability of petitioners
of said estate.
the United States Court of Appeals
Circuit is established by the fact that

les, which collection district is within t
tion of the Court of Appeals for the Ni
and by the fact that the parties here
stipulated that the decision by the Tax
be reviewed by any Court of Appeals ot
one herein designated.

The amount of the deficiency in estat
mined by the Tax Court (prior to the
any credit for State inheritance tax)
842.44. Said deficiency represents the
payable as a result of inclusion in gr
(a) certain amounts to which the pa
in a stipulation dated and filed with th
on November 29, 1948, and which are
troversy, and (b) the transfers to the
January 29, 1932, made by decedent
to under heading I above, the inclusi
in the gross estate represents the matt
versy on this appeal.

The proceedings upon which the de
Tax Court determining said deficiency
were as follows: On April 1, 1949, th
promulgated its Memorandum Opinion
Van Fossan), holding that said tran
trust, described under heading I abo
cludible in gross estate. Thereafter, b
fact that they had had no opportunity
nonapplicability of the Church decis
to in heading I above, the petitioners f

by the Tax Court on April 14, 1949, and
l 25, 1949, a Motion for Review by the
eport of a Division, which motion was
ne Tax Court on April 27, 1949.
7, 1949, pursuant to its Memorandum
e Tax Court entered its Order and De-
there is a deficiency in estate tax of
This petition for review is for a re-
decision by the Tax Court holding that
the trust made by the decedent on Jan-
32, in the total amounts of $152,951.83
5.10 respectively are to be included in
and is filed pursuant to the provisions
1141 and 1142 of the Internal Revenue

e, Petitioners pray that the decision of
urt of the United States be reviewed by
States Court of Appeals for the Ninth
t a transcript of the record be prepared
ce with the law and the rules of said
e transmitted to the Clerk of said Court
nd that appropriate action be taken to
t the errors herein complained of may
and corrected by said Court.
ly 26, 1949.

/s/ JOSEPH D. BRADY,
/s/ WALTER L. NOSSAMAN,
/s/ LUCIEN W. SHAW,
Counsel for Petitioners on

In the Tax Court of the United S

Docket No. 14,985

ESTATE OF MYRON SELZNICK,
BANK OF AMERICA NATIONA
AND SAVINGS ASSOCIATION
O. SELZNICK and CHARLES H
Executors,

Peti

vs.

COMMISSIONER OF INTERNAL R

Resp

PETITIONERS' DESIGNATIO
CONTENTS OF RECORD ON RI

To the Clerk of the Tax Court of
States:

The above-designated petitioners, bei
petitioners on review, hereby designate
sion in the record for consideration by
States Court of Appeals for the Ninth
review of the decision of the Tax Co
United States entered in said proceedi
7, 1949, the entire record as follows:

1. The docket entries of all proceed
the Tax Court.

2. Pleadings before the Tax Court, i

(a) Petition, including annexed
(being a copy of deficiency letter and st

ıtion between the parties dated Novem-
and filed with the Tax Court upon said

ts to the stipulation referred to in para-
follows:

bit 1-A—Declaration of Trust. Three
pies of said Exhibit are filed herewith;
number thereof may be compared and
l included in the record.

bits 2-B, 3-C, 4-D, 5-E, 6-F, 7-G, 8-H,
J—insurance policies. Copies of said
be included in the record, except that,
ed States Court of Appeals for the
it orders and directs the transmission
ıal exhibits on file with the Clerk of the
o said Court of Appeals in their orig-
or the inspection of that Court, the
of such original exhibits shall be made
pying the same into the record.

bit 11-K—Statement of Payments of
to Myron Selznick from Trust Number
by Citizens National Trust and Savings
s Angeles as Trustee. Three duplicate
aid Exhibit are filed herewith; the
ber thereof may be compared and certi-
luded in the record.

emorandum Opinion of the Tax Court
il 1, 1949.

ı to Withdraw Memorandum Opinion

1949, and order denying said motion, d
14, 1949.

7. Motion for Review by the Court of
a Division, filed April 25, 1949, and ord
said motion dated April 27, 1949.

8. Respondent's Computation for En
cision filed May 3, 1949.

9. Stipulation with respect to Entry
Under Rule 50 filed May 31, 1949.

10. Decision entered June 3, 1949.

11. Order and Decision entered June

12. Petition for Review by the Uni
Court of Appeals for the Ninth Circuit.

13. Notice of Filing Petition for
gether with proof of service thereof and
of a copy of the Petition for Review.

14. This Designation of Contents of
Review.

Request is hereby made that a transcr
record be prepared, certified and transmi
Clerk of the Tax Court of the United St
Clerk of the United States Court of A
the Ninth Circuit as required by law an
of said Circuit Court of Appeals.

Dated: July 26, 1949.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAM

/s/ LUCIEN W. SHAW,

Counsel for Petitio

service of a copy of the foregoing Des-
hereby acknowledged as having been
st day of August, 1949.

GEORGE J. SCHOENEMAN,
Commissioner of Internal
Revenue, Respondent.

/s/ CHARLES OLIPHANT,
Chief Counsel for the Bureau
of Internal Revenue.

r 29, 1949 T.C.U.S.

United States Court of Appeals
For the Ninth Circuit

ax Court Docket No. 14,985

OF MYRON SELZNICK, Deceased,
OF AMERICA NATIONAL TRUST
AVINGS ASSOCIATION, DAVID
ZNICK and CHARLES H. SACHS,
rs,

Petitioners on Review,

vs.

ONER OF INTERNAL REVENUE,
Respondent on Review.

FOR TRANSMISSION OF ORIG-
EXHIBITS ON FILE WITH THE

of the United States Court of Appea
Ninth Circuit, and to the other Judg
Court:

The above-designated petitioners on re
petitioners in a proceeding before the Ta
the United States, bearing docket number
which proceeding the Tax Court render
cision on June 7, 1949, that there is a de
federal estate tax owing by said petition
amount of $199,842.44. Petitioners have
their petition for a review of said decisi
Court, and have filed their designation o
tents of the record on review. In said d
it is requested that there be included in s
the complete record of all the proceedings
fore the Tax Court of the United States
with copies of exhibits, except that if t
States Court of Appeals for the Ninth C
rects the transmission of certain of said
namely, Exhibits 2-B, 3-C, 4-D, 5-E, 6-F,
9-I and 10-J, which are photostatic cop
surance contracts, for the inspection of th
Appeals, said exhibits may be omitted
transcript prepared by the Clerk of the T
and transmitted in original form.

The exhibits referred to are photostatic
insurance contracts which it would be in
to attempt to copy in a form which wou
telligible to this Court.

this Court the original exhibits num-
3-C, 4-D, 5-E, 6-F, 7-G, 8-H, 9-I and
e with the Clerk of the Tax Court in said
, bearing docket number 14,985, in the
d Court, said original exhibits to be in
ying the same into the transcript pre-
ne Clerk of the Tax Court of the record
herein.

July 29, 1949.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAMAN,

/s/ LUCIEN W. SHAW,

Counsel for Petitioners on Review.

---

ourt of Appeals and Cause.]

DIRECTING TRANSMISSION OF
INAL EXHIBITS ON FILE WITH
TAX COURT

ve-designated petitioners on review have
heir petition for a review of the decision
Court of the United States in a proceed-
said Tax Court bearing docket number
ch decision was entered by said Court on
49. Said petitioners have also duly filed
nation of the contents of the record on

with the Tax Court in lieu of transcribin
hibits into the record on review.

Accordingly, It Is Hereby Ordered that
of the Tax Court of the United States be
hereby, directed to furnish the United St
of Appeals for the Ninth Circuit the or
hibits numbered 2-B, 3-C, 4-D, 5-E, 6-F,
9-I and 10-J, on file with the Clerk o
Court in said action, bearing docket num
in the files of said Court, said original
be furnished in lieu of copying the sam
transcript prepared by the Clerk of the
of the record on review herein.

Dated: August 2, 1949.

WILLIAM DENMAN,
Chief Judge of the United States Court
for the Ninth Circuit.

HOMER T. BONE,
WILLIAM E. ORR.

A true copy.
Attest. August 3, 1949.

PAUL P. O'BRIEN,
Clerk.

[Seal] By /s/ F. SCHMID,
Deputy.

[Endorsed]: Filed August 2, 1949 U.

[Endorsed]: Received and filed Aug
T.C.U.S.

e Tax Court of the United States
Washington

Docket No. 14,985

OF MYRON SELZNICK, Deceased,
K OF AMERICA NATIONAL TRUST
SAVINGS ASSOCIATION, DAVID
ELZNICK and CHARLES H. SACHS,
tors,

Petitioners,

vs.

SIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

r S. Mersch, Clerk of The Tax Court
ited States do hereby certify that the
documents, 1 to 15 inclusive, constitute
l of the original papers and proceedings
ny office as called for by the "Designation
ents of Record of Review" in the pro-
fore The Tax Court of the United States
Estate of Myron Selznick, Deceased, Bank
a National Trust and Savings Associa-
d O. Selznick and Charles H. Sachs,
Petitioners, v. Commissioner of Internal
Respondent," Docket Number 14985 and
ne petitioners in The Tax Court proceed-
tiated an appeal as above numbered and

appear in the official docket book in my

In testimony whereof, I hereunto set
and affix the seal of The Tax Court of t
States, at Washington, in the District of
this 18th day of August, 1949.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Co
United States.

[Endorsed]: No. 12335. United State
Appeals for the Ninth Circuit. Estate
Selznick, Deceased, Bank of America
Trust and Savings Association, David O
and Charles H. Sachs, Executors, Petiti
Commissioner of Internal Revenue, Re
Transcript of the Record. Upon Petition
a Decision of The Tax Court of the Unit

Filed August 22, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appe
Ninth Circuit.

e United States Court of Appeals,
For the Ninth Circuit

No. 12335

OF MYRON SELZNICK, Deceased,
OF AMERICA NATIONAL TRUST
SAVINGS ASSOCIATION, DAVID
LZNICK and CHARLES H. SACHS,
ors,

Petitioners on Review,

vs.

IONER OF INTERNAL REVENUE,
Respondent on Review.

Tax Court Docket No. 14,985

ITIONERS' DESIGNATION OF
ENTS OF RECORD ON REVIEW

erk of the above-entitled Court, and to
. Theron L. Caudle, Assistant Attorney
l, and Charles Oliphant, Chief Counsel,
u of Internal Revenue, Counsel for Re-
nt on Review:

tioners above, by their attorneys, hereby
for inclusion in the transcript of record
w the entire record before The Tax Court
ited States as transmitted to the Clerk
urt by the Clerk of the Tax Court, as

Document No. D
by Clerk of Ta
Docket Entries .....
Petition .....
Answer .....
Stipulation .....
J
Exhibits 1-A and 11-K.....
(For Exhibits 2-B through 10-J, see H
B., below)
Memorandum Opinion .....
Motion to Withdraw Memorandum Opinio
to Permit Filing of Petitioners' S
mental Brief—Denied .....
Motion for Review by the Court of Rep
a Division—Denied .....
Respondent's Computation for Entry of D
Stipulation with Respect to Entry of D
Under Rule 50.....
Decision .....
Order and Decision.....
Petition for Review and Proof of Service
Petitioners' Designation of Contents of
on Review (to Tax Court).....
Court Order re Original Exhibits.....
Certificate and Seal.....
Statement of Points on which Petitioners
to Rely on Review.....
Motion for Consideration of Original Exh

nation of Contents of Record on

. . . . . —

s to be considered by the Court in Origi-
n, if ordered by the Court:

d by this Court of Appeals pursuant
nd Order filed herewith, Exhibits 2-B,
E, 6-F, 7-G, 8-H, 9-I, and 10-J, which
f Document Number 5 as filed with the
s Court by the Clerk of the Tax Court,
sidered by this Court in their original
ough set out in the printed record. If
loes not order the consideration of said
their original form, then they shall be
the printed record by the Clerk herein.

August 27, 1949.

/s/ JOSEPH D. BRADY,
/s/ WALTER L. NOSSAMAN,
/s/ LUCIEN W. SHAW,
Counsel for Petitioners
on Review.

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ourt of Appeals and Cause.]

DAVIT OF SERVICE BY MAIL

lifornia,
Los Angeles—ss.

L. Haroff, being first duly sworn, de-
ays: That this affiant is a citizen of the

a party to the within and above entitled a
this affiant is making this service for
Brady, Walter L. Nossaman and Lucien
who are the attorneys for the Petitione
action.

That on the 29th day of August, 19
served the within Petitioners' Designatio
tents of Record on Review on the Resp
this action by placing a true copy ther
envelope addressed to one of the attorneys
for said Respondent at the business addr
attorney, as follows: Theron L. Caudle,
sistant Attorney General, Department
Washington 25, D. C., by then sealing sai
and depositing the same, with postage the
prepaid, in the United States Post Off
Angeles, California.

That there is delivery service by Uni
mail at the place so addressed or there is
communication by mail between the place
and the place so addressed.

/s/ VIRGINIA L. HARO

Subscribed and sworn to before me thi
of August, 1949.

[Seal] /s/ JULIA M. FITZSIMM
Notary Public, in and for the County o
geles, State of California.

My commission expires February 17,

[Endorsed]: Filed Aug. 30, 1949.

ourt of Appeals and Cause.]

NT OF POINTS ON WHICH PETI-
S INTEND TO RELY ON REVIEW

rs hereby designate the following as the
which they intend to rely in the review
proceeding by the United States Court
for the Ninth Circuit:

Tax Court of the United States erred in
hat transfers of decedent to a trust
January 29, 1932, totaling $301,756.93,
ible in the decedent's gross estate for
te tax purposes, in reliance solely upon
of the Supreme Court in the case of
er v. Francois L. Church, Deceased,
U. S. 632, 69 S.Ct. 322, without giving
any opportunity to argue the effect of
n herein.

decedent did not retain for his life, or
not ending before his death, the posses-
joyment of, or the income from, the
us erroneously included in decedent's
by the Tax Court. (Sec. 302(c)(1) of
e Act of 1926, as amended by the Joint
of March 3, 1931.)

decedent did not retain for his life or
not ending before his death the right to
he persons who shall possess or enjoy
y thus erroneously included in gross
e Tax Court, or the income therefrom

4. With respect to none of the prop
eously included in decedent's gross est
Tax Court, was the enjoyment thereof
date of decedent's death subject to a
through the exercise of a power eith
decedent alone, or in conjunction with a
to alter, amend or revoke. (Sec. 302(d
Act of 1926.)

5. With respect to life insurance cont
were a part of the property erroneously
the decedent's gross estate by the Tax C
time after January 10, 1941, did the de
sess any incident of ownership therein.
(g), Internal Revenue Code.)

6. The Tax Court erred in holding a
that there was any deficiency in Federa
based on including in gross estate said t
decedent of property to said trust.

7. The Tax Court erred in rendering
and decision which, in the respects abo
ated, are contrary to the controlling law
tions, and are not supported by any evi
case.

Dated: August 27, 1949.

/s/ JOSEPH D. BRADY

/s/ WALTER L. NOSSA

/s/ LUCIEN W. SHAW,

Counsel for Petiti
on Review.

ourt of Appeals and Cause.]

DAVIT OF SERVICE BY MAIL

lifornia,
Los Angeles—ss.

L. Haroff, being first duly sworn, de-
ays: That this affiant is a citizen of the
es of America, a resident of the County
eles, over the age of eighteen years, not
the within and above entitled action;
fiant is making this service for Joseph
Walter L. Nossaman and Lucien W.
are the attorneys for the Petitioners in

the 29th day of August, 1949, affiant
within Statement of Points on Which
Intend to Rely on Review on the re-
n this action by placing a true copy
an envelope addressed to one of the
or record for said Respondent at the
ldress of said attorney, as follows:
Caudle, Esq., Assistant Attorney Gen-
tment of Justice, Washington 25, D. C.,
aling said envelope and depositing the
postage thereon fully prepaid, in the
tes Post Office at Los Angeles, Cali-

re is delivery service by United States
place so addressed or there is a regular

communication by mail between the plac
ing and the place so addressed.

/s/ VIRGINIA L. HARO

Subscribed and sworn to before me th
of August, 1949.

[Seal] /s/ JULIA M. FITZSIMM
Notary Public, in and for the County
geles, State of California.

My commission expires February 17,

[Endorsed]: Filed Aug. 30, 1949.

[Title of Court of Appeals and Cause.]

MOTION FOR CONSIDERATIO
ORIGINAL EXHIBITS

On August 2, 1949, the Honorable Wi
man, Chief Judge of the United State
Appeals for the Ninth Circuit, and the
Homer T. Bone and the Honorable Willi
Judges of said Court, made an order dir
the Clerk of the Tax Court of the Un
furnish to this Court original exhibits N
through 10-J, on file with the Clerk
Court in this proceeding, bearing Dock
14,985 in the files of said Court, said
hibits to be furnished in lieu of copying
the transcript prepared by the Clerk
Court of the record on review herein.

bits transmitted in their original form
tic copies of insurance contracts, which
npractical to attempt to reproduce in
a form which would be intelligible to

s on review therefore respectfully re-
is Court make its order that each of the
hibits transmitted in original form, be-
s 2-B through 10-J, be omitted from the
rd herein and instead be considered by
n connection with this review in their
m as though set out in the printed rec-
id review.

ugust 27, 1949.

/s/ JOSEPH D. BRADY
/s/ WALTER L. NOSSAMAN
/s/ LUCIEN W. SHAW
Counsel for Petitioners
on Review.

---

urt of Appeals and Cause.]

R FOR CONSIDERATION OF
ORIGINAL EXHIBITS

e-designated petitioners on review have
heir motion for consideration in their
m of certain exhibits heretofore trans-
is Court by the Clerk of the Tax Court
ed States, and good cause therefor ap-

It Is Hereby Ordered that Exhibits
4-D, 5-E, 6-F, 7-G, 8-H, 9-I, and 10-J,
transmitted to this Court in their origina
now in the files of the above-entitled pro
review in this Court, shall be omitted
printed record on review herein; and
omitted exhibits shall be considered by
in connection with this review in their ori
as though set out in said printed record

Dated: August 30, 1949.

/s/ WILLIAM DENMAN
/s/ WILLIAM HEALY,
/s/ HOMER T. BONE
Judges U. S. Court
for the Ninth Ci

[Title of Court of Appeals and Cause.]

AFFIDAVIT OF SERVICE BY

State of California,
County of Los Angeles—ss.

Virginia L. Haroff, being first duly
poses and says: That this affiant is a cit
United States of America, a resident of
of Los Angeles, over the age of eighteen y
party to the within and above entitled a
this affiant is making this service for
Brady, Walter L. Nossaman and Lucien

he 29th day of August, 1949, affiant
within Motion for Consideration of
nibits on the Respondent in this action
true copy thereof in an envelope ad-
ne of the attorneys of record for said
at the business address of said attorney,
Theron L. Caudle, Esq., Assistant At-
ral, Department of Justice, Washington
then sealing said envelope and deposit-
e, with postage thereon fully prepaid,
ed States Post Office at Los Angeles,

e is delivery service by United States
place so addressed or there is a regular
on by mail between the place of mailing
e so addressed.

/s/ VIRGINIA L. HAROFF

and sworn to before me this 29th day
949.

/s/ JULIA M. FITZSIMMONS

ic, in and for the County of Los An-
ate of California.

ssion expires February 17, 1952.

]: Filed Sept. 1, 1949.

United States Court of Appeals
for the Ninth Circuit
No. 12335

OF MYRON SELZNICK, Deceased,

,

vs.

SIONER Of INTERNAL REVENUE.

MANDATE

tates of America—ss.

esident of the United States of America

onorable the Judges of the Tax Court of
Jnited States.

s, lately in the Tax Court of the United
fore you or some of you, in a cause be-
tate of Myron Selznick, Deceased; Bank
ca National Trust and Savings Associa-
id O. Selznick, Charles H. Sachs, Execu-
tioners, and Commissioner of Internal
respondent, Docket No. 14985, a Decision
entered on the 3rd day of June, 1949,
d Decision is of record and fully set out
use in the office of the clerk of the said Tax
the United States, to which record refer-
ereby made and the same is hereby ex-
ade a part hereof:

petitioned to this court as by the inspecti
transcript of the record of the said Tax Co
was brought into the United States Cou
peals for the Ninth Circuit by virtue of
agreeably to the Act of Congress, in s
made and provided, fully and at large a

And Whereas, on the 28th day of Dec
the year of our Lord, one thousand nine
and forty-nine, the said cause came on to
before the said United States Court of Ap
the Ninth Circuit, on the said transcript
and on stipulation of counsel for respecti
that the decision of the Tax Court should
and the cause remanded to the Tax Cour
ther consideration.

On Consideration Whereof, It is now her
and adjudged by this Court that the decis
said Tax Court of the United States in
be, and hereby is vacated, and that this
and hereby is remanded to the Tax Cou
United States for further consideration in
of the amendments of October 25, 1949, t
811 (c) and also subdivisions (d) and (
Internal Revenue Code (December 28, 194

You, Therefore, Are Hereby Commar
such proceedings be had in said cause, in
ity with the judgment of this court, as acc
right and justice, and the laws of the Unit
ought to be had, the said petition for re

s the Honorable Fred M. Vinson, Chief
the United States, the twenty-eighth day
ber, in the year of our Lord one thousand
lred and forty-nine.

/s/ PAUL P. O'BRIEN,
nited States Court of Appeals for the
Circuit.

d and filed T.C.U.S. January 4, 1950.

---

ie Tax Court of the United States
Docket No. 14985

OF MYRON SELZNICK, Deceased;
K OF AMERICA NATIONAL TRUST
SAVINGS ASSOCIATION, DAVID O.
ZNICK AND CHARLES H. SACHS,
itors,

Petitioners,

vs.

SSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated November 28, 1950

ON AND SUPPLEMENTAL OPINION

cedent created an irrevocable trust on Jan-
1932, to which and prior to June 7, 1932,
erred insurance contracts and bonds. The

accrued at the decedent's death be paid to
trust beneficiary. Under the terms of the
decedent could cancel the insurance pol
the proceeds thereof would become pa
corpus, the investment of which he could d
receive the income from. At the decedent
there were $1,138.36 of accrued trust
which the trustee had not distributed to
dent. The decedent died in 1944. Section
P.L. 378, 81st Cong. (1949) amends sectio
of the Code and makes it applicable to e
decedents dying after February 10, 1939
7 (b) of the 1949 Act further provides th
erty transferred after March 3, 1931, and
June 7, 1932, will not be included in the gr
unless it would have been includible by
the amendatory language of the Joint Reso
March 3, 1931 (46 Stat. 1516).

1. Held, the non-insurance assets tr
to the trust prior to June 7, 1932, are i
in the decedent's gross estate by reas
amendatory language of the Joint Reso
March 3, 1931, and section 811 (c) of

2. Held, further, the insurance a
includible in the decedent's gross esta
section 811 (g) of the Code.

LUCIEN W. SHAW, ESQ.,
For the Petitioners.

SUPPLEMENTAL OPINION

an, Judge:

pondent determined a deficiency of $384,- the estate tax liability of the Estate of lznick, deceased. On June 23, 1947, the of the Estate of Myron Selznick peti- s Court for a redetermination of the The parties came to agreement and set- lpulation many of the issues from which art of the deficiency arose. On April 1, Memorandum Opinion of this Court was hich sustained the respondent's inclusion ss estate under section 811 (c), Internal Code, of certain property transferred by nt in trust. That Memorandum Opinion on the recent decision in the case of oner v. Estate of Church, 335 U.S. 651. 3, 1949, a decision of the Tax Court was hat there was a deficiency in estate tax 2.44. The petitioner appealed from that o the Court of Appeals for the Ninth hich remanded the proceedings to this he nature of the cause under mandate is herein, in part, as follows:

* on stipulation of counsel for respective s that the decision of the Tax Court l be vacated and the cause remanded to ax Court for further consideration:

Consideration Whereof, It is now here

States in this cause be, and hereby
and that this cause be, and hereby is
to the Tax Court of the United State
ther consideration in the light of th
ments of October 25, 1949, to Sectio
and also subdivisions (d) and (g) of
nal Revenue Code.

The amendments to the Code enact cert
active statutory changes in the law as a
Commissioner v. Estate of Church, supra,
in our Memorandum Opinion vacated by
of Appeals for the Ninth Circuit.

The factual record we have before us is
as in the prior proceedings and consis
pleadings and a stipulation of facts with
attached. The facts as stipulated are so f
insofar as they are pertinent to the issu
ing, are set forth below.

The parties have submitted additional
which the argument is directed toward
now before us, viz:

Whether any part of the assets trans
the decedent to a trust created by him on
29, 1932, should be included in the decede
estate under section 811 (c) or (d) or (
Code, as amended by P.L. 378, 81st Cong.

Findings of Fact

The petitioners are the duly appointed a

the collector of internal revenue for the
ict of California on June 22, 1945.
uary 29, 1932, the decedent created a trust
e Citizens National Trust and Savings
os Angeles as trustee.

II of the trust agreement reads as follows:
Trustor agrees that as to the insurance
s delivered to the Trustee or which may
ter be delivered to it:
cause each and every policy intended to
ade subject to this agreement and the
hereunder to be made payable to the
ee by sufficient designation as beneficiary
f, or in such other manner as the parties
and any insurer shall agree, and the
ee assumes no responsibility for the suffi-
or effect of any instrument or agreement
ich any policy shall be made payable to it.

III of the trust agreement provides, in

ing the lifetime of the Trustor, Myron
ck, no sale or exchange of property which
t any time comprise the principal of the
estate, and no change in the investments
principal of the trust estate, shall be
by the Trustee except on the written
and direction of said Trustor or his duly
ized agent, ...,

designated from time to time, the
direct, in writing, said Trustee as to
ment of all cash principal, in any
and/or property whether or not the
be approved and permissible by law
ment of trust funds under the laws of
of California. * * * The Trustor
serves the right by written instru
with the Trustee, to revoke said ap
of David O. Selznick and/or Loyd W
to substitute other persons to act f
lieu of David O. Selznick and/or Loy
in the capacities herein in this parag
vided for them to act.

Article VI of the trust agreement pr
part:

> * * * [The trustees] shall, after
> cash or other securities have been de
> this trust so that the income therefro
> sufficient, (until such time the Trus
> to pay said premiums himself), also
> and all premiums on life insuranc
> and/or contracts which may be t
> and/or delivered by the Trustor to th
> pursuant to the terms hereof, * * *

Article VII of the trust agreement rea
lows:

> This Trust is irrevocable. The

be by said Trustee paid monthly or in convenient installments as directed by rustor to Myron Selznick for and during etime; the said Myron Selznick, however, es the right to direct the Trustee from o time to credit, keep and add any and ome which, pursuant to the terms hereof, e payable to him, to the principal of the s of the trust estate, by giving written ctions from time to time so demanding.

VIII of the trust agreement reads, in llows:

m and after the death of the said Myron ck, the entire net income received or de- from the trust estate and available for ution hereunder shall go and be paid by Trustee in equal monthly installments, as s: [There follows various provisions for stribution of the trust income to the dece- widow, daughter, parents, brothers and children and a final provision for termi- of the trust and distribution of the s and for remainder to charity on the e of any of the heirs surviving.]

VIII further provides that:

Trustor reserves the right to change or tute, from time to time, the said chari- institutions, by giving notice of such

Notwithstanding the fact that this
tion of Trust is irrevocable, the Tr
himself and on behalf of the benefic
serves the right to petition any cour
petent jurisdiction at any time and
to time to amend and/or construe
provided, however, that no amendm
change the provisions of this trust w
have the effect or which is intended t
cause the same to be construed to be
it to be a revocable trust rather than
vocable one.

The Trustor reserves the absolute
cancel or cause to be cancelled, and
cause to be revoked, any of the insur
cies herein referred to, or which may
be added to this Trust, provided tha
obtain the written consent of any tw
following, to wit: The Trustee, David
nick and Loyd Wright; provided fur
upon any cancellation any cash surre
ues received on any such policies, sha
in and/or be added to the corpus of th

Article XIII of the trust agreement
follows:

Any income accrued or undistribut
termination of any trust or estate h
shall belong and go to the beneficiary

ded, however, that it is an express condi-
of the trust herein created, which shall
precedence over any and all other pro-
as herein relative to the distribution of
rust estate, that the Trustee is authorized
empowered and may in its sole and abso-
discretion, although it is not obligated so
, from the net income and/or principal of
rust estate and in such manner as to it
seem equitable and just, pay a reasonable
toward defraying either in whole or in
the expenses of the last illness and of the
al of the Trustor and/or any specifically
d or contingent beneficiary or beneficiaries
said Trust.
edent transferred assets to said trust as

uary 29, 1932, decedent transferred to the
ets (other than life insurance contracts)
value on the date of decedent's death of
3. After June 6, 1932, decedent trans-
said trust, assets (other than life insur-
racts) having a value on the date of
death of $130,817.79, which amount it is
and agreed, in any event, is properly
in decedent's gross estate (and which
$28.81 more than the amount reported
ate tax return on account of said assets).
t also assigned to the trust, prior to June
fe insurance contracts owned by him, as

Number	Insurance Company
4,330,590	Mutual Life Insurance Company.....
10,484,859	New York Life Insurance Company.....
10,484,860	New York Life Insurance Company.....
10,541,918	New York Life Insurance Company.....
62,036	Peoples Life Insurance Company.....
63,287	Peoples Life Insurance Company.....
108,328-R	Indianapolis Life Insurance Co.....
102,324	Indianapolis Life Insurance Co.....
109,395	Indianapolis Life Insurance Co.....

The total proceeds of the life insurance as of the date of decedent's death, were $ of which the portion allocable to premi prior to January 10, 1941, was $148,805.1 portion allocable to premiums paid after was $39,470.21, which latter sum, it is and agreed, is in any event, includible in gross estate (and which represents $62.63 the amount reported in the estate tax account of said insurance).

As set forth in the declaration of trus income of the trust was to be paid to My nick. The trustee paid various amounts to dent from time to time as follows:

Date	Amount of
July 1, 1932	$ 4
January 11, 1933	1,5
April 10, 1933	1,6
September 2, 1933	8

e	Amount of Payment
6, 1934	$2,410.62
st 16, 1934	1,422.41
mber 5, 1934	1,334.95
mber 2, 1934	1,262.59
mber 2, 1934	459.22
ary 1, 1935	2,448.77
4, 1935	716.00
2, 1935	1,879.53
st 7, 1935	2,376.99
mber 4, 1935	544.65
mber 4, 1935	436.68
mber 4, 1935	1,571.99
ry 4, 1936	23.98
ary 4, 1936	714.90
2, 1936	480.00
2, 1936	100.00
3, 1936	1,357.59
st 3, 1936	3,244.81
mber 3, 1936	500.00
mber 21, 1936	71.53
er 7, 1936	1,212.46
mber 6, 1936	457.40
ry 9, 1937	3,626.45

Date	Amount of
May 5, 1937	$2,
July 6, 1937	
August 6, 1937	6,
September 3, 1937	10,
April 11, 1940	20,
June 5, 1940	
November 8, 1940	
March 18, 1942	1,

On the date of decedent's death th
$1,138.36 of trust income on hand with t
which had accrued and which had not
tributed to the decedent.

It was stipulated that, depending
Court's decision with respect to the
amounts includible in gross estate or
thereof will be as follows:

If the Court finds that neither the non
assets nor the life insurance contracts t
to the trust prior to June 7, 1932, are inc
gross estate, the amount includible in gr
on account of the trust is $170,288 (whic
more than the amount included on accou
in the estate tax return).

If the Court finds that the non-insura
transferred to the trust prior to June 7,
not includible in gross estate but that the

19,093.10.

Court finds that all of the assets trans- decedent to the trust (including both nce assets and insurance contracts) are in gross estate, the amount includible in e on account thereof is $472,044.93.

pondent determined in the notice of de- at all of the property transferred by the o the trust created on January 29, 1932, included in the gross estate of the dece- uant to section 811 (c) of the Internal Code.

proceedings in the Court of Appeals for Circuit the parties stipulated as follows:

s is an estate tax case and it presents the on whether property transferred to a cer- rust should be included in the gross estate edent, pursuant to Section 811 (c), (d) of the Internal Revenue Code.

Tax Court held that the property in on should be included in the decedent's estate under Section 811 (c) and based cision solely on the Church case (Com- ner v. Estate of Church, 335 U.S. 632). Tax Court's memorandum opinion was d herein on April 1, 1949. Since that Section 811 (c) has been amended and le of the Church case has been affected

decision of the Tax Court be vacated
cause be remanded to it for further
ings.

Accordingly it is hereby stipulated
decision below should be vacated and
should be remanded to the Tax Court
ther consideration in the light of th
mentioned amendments to Section 811
also subdivisions (d) and (g).

* * *

Opinion

The issue is whether any of the asse
ferred by the decedent, prior to June 7, 1
trust created by him on January 29, 193
be included in the decedent's gross esta
section 811 (c) or (d) or (g) of the Inte
enue Code, as amended by P.L. 378, 81
(1949).

The decedent created a trust to which
ferred income-yielding property and als
insurance policies on his own life. We s
sider first whether the income-yielding
(referred to as the non-insurance assets) s
included in the gross estate under section
and then the question of the includibilit
insurance assets under section 811 (g). W
that the necessity for the treatment of the
in its separate phases will be apparent
discussion to follow.

e part by the exact statutory language
olies. The question is a narrow one and
nly to a limited area in the history of
specifically, transfers between the dates
1931, and June 7, 1932. We shall make
t to review the entire judicial and legis-
ory of the various Code provisions men-
ein.* Much of the confusion that has
the past concerning the various inter-
of what is now section 811, has no bear-
s controversy other than as a source of
d material. The recent amendment to
1 in the 1949 Act has done much to clear
st confusion. In any event, it is a field
been described as so fluid "that the wise
dogmatic even when that is true." Paul,
state and Gift Taxation (1942), page 338.
terms of section 7 (b) of P.L. 378, 81st
49), section 811 (c), as set forth in the
s made applicable to the estates of dece-

We may refer the reader to Tax Law
larch, 1950, page 309; 58 Yale Law Jour-
9 Yale Law Journal 395.

1. Gross Estate.
ue of the gross estate of the decedent shall
ned by including the value at the time of
of all property, real or personal, tangible
ble, wherever situated, except real prop-
ed outside of the United States——

* * *

Transfers in Contemplation of, or Tak-

in these proceedings died in 1944 and his
therefore, within the purview of the 1949
tion 7 (b) of that Act further provides
that:

> * * * The provisions of section 81
> (B) of such code shall not, in the
> decedent dying prior to January 1, 1
> to—
>
> (1) a transfer made prior to Marc
> or
>
> (2) a transfer made after March
> and prior to June 7, 1932, unless the
> transferred would have been includi
> decedent's gross estate by reason of
> datory language of the joint reso
> March 3, 1931 (46 Stat. 1516).

The "amendatory language of the joi
tion of March 3, 1931 (46 Stat. 1516)" r
above reads, in the pertinent part, as foll

> time made a transfer (except in case
> fide sale for an adequate and full con
> in money or money's worth) by trust
> wise——
>
> * * *
>
> (B) under which he has retained f
> or for any period not ascertainabl
> reference to his death or for any per
> does not in fact end before his deat
> possession or enjoyment of, or the ri
> income from, the property, or (ii)
> either alone or in conjunction with ar

including a transfer under which the
eror has retained for his life or any
not ending before his death (1) the pos-
n or enjoyment of, or the income from,
roperty or (2) the right to designate the
ns who shall possess or enjoy the property
income therefrom; * * *

ords were added to section 302 (c) of the
s follows:

302. The value of the gross estate of
cedent shall be determined by including
lue at the time of his death of all prop-
real or personal, tangible or intangible,
ver situated—

* * *

To the extent of any interest therein of
the decedent has at any time made a
er, by trust or otherwise, in contempla-
f or intended to take effect in possession
oyment at or after his death, [here was
ed the amendatory language of the joint
tion of March 3, 1931] except in case of
a fide sale for an adequate and full con-
tion in money or money's worth. * * *

stion, therefore, is whether or not the
retained for his life or any period not
ore his death (1) the possession or enjoy-
r the income from, the property." This
licable part of the amendatory language

cluded in the gross estate.

The facts in the light of which the pre
tory language must be interpreted may
marily set forth as follows: On January
the decedent created an irrevocable trust
(and prior to June 7, 1932) he transferr
assets. The trust provided that:

> * * * The entire net income receive
> rived from the trust estate and ava
> distribution hereunder shall be by sai
> paid monthly or in other convenien
> ments as directed by the Trustor
> Selznick for and during his lifetime
> Myron Selznick, however, reserves th
> direct the Trustee from time to time
> keep and add any and all income wh
> suant to the terms hereof, may be p
> him to the principal of the corpus of
> estate, by giving written instructions
> to time so demanding.
>
> * * *
>
> Any income accrued or undistribut
> termination of any trust or estate h
> shall belong and go to the benef
> beneficiaries entitled to the next
> estate, in the same proportions as
> cipal hereof, * * *

On the date of the decedent's death th
$1,138.36 of accrued trust income which th

created, the decedent's estate would be
he retained "the possession or enjoyment
income from, the property." In the face
nguage the decedent created this trust
that he be paid the income "monthly or
convenient installments as directed" by
ould seem that to state the question thus,
vide the answer. But the petitioners con-
because the decedent did not receive all
ome from the trust which accrued during
e did not retain "the possession or enjoy-
r the income from the property." That
itioners contend that the decedent "* * *
he right to the income only for a period
to end before the end of his life. There-
r the language of section 302 (c), as it
January 29, 1932, the transfer was not
Petitioners concede that assets trans-
he trust after June 6, 1932, are includible
ss estate.

itioners seek to derive support for their
rom the Committee Reports on the Rev-
of 1932 and the respondent's regulations.
rial part of the 1932 Act is set forth in
n.[2]

2. The value of the gross estate of the
hall be determined by including the value
e of his death of all property, real or per-
gible or intangible, wherever situated—
* * *

1932, Cumulative Bulletin 1939-1, Part 2, p
532, reporting upon the amendment to se
(c) of the Act of 1926 (as amended by
Resolution of 1931), read, in part, as fol

> The purpose of this amendment t
> 302 (c) of the Revenue Act of 1926 is
> in certain respects the amendments
> that section by the joint resolution
> 3, 1931, which were adopted to rende
> a transfer under which the decedent
> the income for his life. The joint
> was designed to avoid the effect of
> of the Supreme Court holding such a
> not taxable if irrevocable and not mad
> templation of death. Certain new m
> also been added, which is without re
> effect.
>
> The changes are:
>
> (1) The insertion of the words "o
> period not ascertainable without ref
> his death," is to reach, for example, a
> where decedent reserved to himself ser
> payments of the income of a trust
> had established, but with the provisio

---

intended to take effect in possession or e
at or after his death, or of which he ha
time made a transfer, by trust or otherwi
which he has retained for his life or for a
not ascertainable without reference to his

f the trust income between the last semi-
l payment to him and his death should
d to him or his estate, or where he re-
the income, not necessarily for the re-
er of his life, but for a period in the
ainment of which the date of his death
necessary element.

* * *

tioners contend that the 1932 Act as it
hrase "or for any period not ascertain-
ut reference to his death" provides for
me for a trust with reservation of "semi-
ayments of income, and was new matter
not retroactive. Changes (2) and (3)
have omitted for the sake of brevity)
state that they are each merely a "clari-
ge." Change (1), which is set out above,
state, and from this petitioners conclude
ge (1) is new matter and not retroactive.
in support of this view, the petitioners
administrative interpretation of the law
ions 105, sec. 81.18.[3]

18. Transfers with possession or enjoy-
ned.—Except in the case of a bona fide
an adequate and full consideration in
money's worth, the gross estate embraces
11 (c)) all property transferred by the
whether in trust or otherwise, if he re-
reserved the use, possession, right to the
other enjoyment of the transferred prop-
if the transfer was made—

At any time after 10:30 p.m., eastern

There is opposed to petitioners' view
purpose of the Joint Resolution of 1931
guage of which determines this issue. I
Heiner, 281 U.S. 238 (1930), the dece
transferred property in trust, the income
was to go to her husband for his life ar
her for her life. It was held that the pro
not includible in the decedent's gross es
next year, on March 2 ,1931, the Supre

---

a period as to evidence his intentio
should extend at least for the durati
life and his death occurs before the e
of such period; or

(2) At any time after 5 p.m., east
ard time, June 6, 1932, and such re
reservation is for any period men
(1) or for any period not ascertainab
reference to his death.

A reservation for a "period not ascertain
out reference to his death" may be illus
a reservation of the right to receive, in
payments, the income of the transferred
where none of the income between the
terly payment and decedent's death was
ceived by him or his estate; or by a rese
a life estate following a precedent estat
or a term of years.

The use, possession, right to the income
enjoyment of the property will be cons
having been retained by or reserved to the
to the extent that during any such perio
be applied towards the discharge of a leg
tion of the decedent, or otherwise for his
benefit.

If such retention or reservation is of a
of the use, possession, income, or other e

wn three per curiam opinions* based on
einer, supra. Those cases differed from
einer, supra, in that there was no inter-
e estate, i.e., the income was reserved for
r with other disposition at death. This
ase is the same as the present situation
t here we have the payment provision
n the income accrued at grantor's death
is beneficiaries. The point is that it was
ion of life income which was before Con-
n, on the very next day after the three
decisions were rendered, the Joint Reso-
March 3, 1931, was enacted. The meaning
esolution was clear—the reservation of
ate will bring the transferred property
gross estate of the transferor. The peti-
gument is that the language of the Joint
of 1931 as it provides for a trust with
tained, did not cover the present trust;
so it took the full force of the language
2 Act which was not retroactive; that the
of the 1932 Act as it states "or for any
ascertainable without reference to his
the use of words in the statute which, for
me, reaches this type of trust. In order
at this argument, petitioners must first
ew that "reservation of income" requires
cent of income to go to the decedent-

other than reliance on the confusion a
tainty that existed in 1931 and 1932 conc
subject sections of the law. We need not
row that confusion or share ancient dou
is another day and another atmosphere
the old language must be examined, for
language of the 1931 change that is revive
of the 1949 Act. In this connection, it is i
to note that there was some doubt in Con
the section of the 1949 Act providing s
for the trusts created between March 3,
June 7, 1932, was at all necessary.[5] Had

---

[5]In the genesis of the 1949 Act, what is
tion 7 (b) (2) thereof was apparently firs
to light on the floor of the Senate with the
colloquy:

> Mr. George: Mr. President, the se
> ator from Colorado has some amen
> this section, I believe, and the senio
> from Pennsylvania left with me an a
> which should now be considered. I
> the desk and ask that it be stated. I
> plain that it is intended to take car
> cases of transfers after March 3,
> prior to June 7, 1932, at which time
> by appropriate resolution, undertook
> their existing in the future, but did
> that resolution retroactive to March
> I doubt whether it is necessary, and I
> to the Senator from Pennsylvania, bu
> to make certain, I now offer the a
> [Emphasis added].
>
> The Presiding Officer: The clerk

been adopted, it would have left trusts
ring the critical period to be examined
lly under the new section 811(c) (1) (b)
petitioner tacitly admits would render
sfers taxable. It is apparent that in the
Congress meant only to give the pre-
the benefit of reliance on May v. Heiner,
to create any new basis for interpretation
nt Resolution of 1931 and subsequent law
etuate the doubts that might have existed
49 as to their interpretation.

the most damaging aspect of the peti-
se is its failure to survive an appraisal
stance of the transfer itself. All of the

---

new paragraph" and insert in lieu there-
vo new paragraphs," and at the end of
11 to add a new paragraph reading as
s:

Exception in the case of transfers after
3, 1931, and prior to June 7, 1932:
rty transferred after March 3, 1931, and
to June 7, 1932, shall not be included in
oss estate under this subsection by rea-
the fact that the decedent retained any
rights described in the amendatory lan-
in section 803 (a) of the Revenue Act of
nless such property is includible by rea-
the amendatory language of the joint
tion of March 3, 1931 (46 Stat. 1516).

George: Mr. President, I should like to
at both the Senators from Pennsylvania
erested in this amendment. While I think
recautionary, at the same time many very
nt lawyers in the State of Pennsylvania

until his power to command the payme
income was ended by his death. He cou
this income at any time and in any mann
sired merely by so requesting the trustee.
decedent enjoyed the trust income durin
to the extent that he desired. No other p
any claim upon that income until the
death and it was then determined how muc
if any, the decedent had not called upon t
to pay over to him. The decedent retained
to the trust income until the time of his d
income to which he had a right but wh
death he had not reduced to possession w
"retained" by him.

In our opinion, and in the language of J
lution of 1931, the decedent made a tr
which he "retained for his life * * * t
from, the property * * * ." We hold, there
the non-insurance assets transferred by
cedent prior to June 7, 1932, to a trust c
him on January 29, 1932, are includib
gross estate under section 811 (c) of the

The next question for consideration is
the proceeds of the insurance policies sho
cluded in the decedent's gross estate. In a
the income-yielding property transferre
trust which we have held above should be
in the gross estate, the decedent transferr
insurance policies to the trust, i.e., he mad

at least indirectly. Section 811 (g), as by the Revenue Act of 1942, and section f that Act apply and are set forth in the

1. Gross Estate.

ue of the gross estate of the decedent shall ined by including the value at the time of of all property, real or personal, tangible ble, wherever situated, except real prop- ted outside of the United States—

* * *

roceeds of Life Insurance.—

* * *

ceivable by other beneficiaries.—To the the amount receivable by all other bene- s insurance under policies upon the life cendent (A) purchased with premiums, onsideration, paid directly or indirectly edent, in proportion that the amount so ne decedent bears to the total premiums ie insurance, or (B) with respect to which nt possessed at his death any of the inci- wnership, exercisable either alone or in n with any other person. For the pur- lause (A) of this paragraph, if the de- nsferred, by assignment or otherwise, a nsurance, the amount paid directly or in- y the decedent shall be reduced by an hich bears the same ratio to the amount tly or indirectly by the decedent as the ion in money or money's worth received edent for the transfer bears to the value icy at the time of the transfer. For the f clause (B) of this paragraph, the term of ownership'' does not include a rever- terest.

law, the proceeds of the policies allocabl
miums paid by the decedent before Jar
1941, will be includible in his gross esta
section 811(g) if he possessed any inc
ownership in the policies after that date.
tioners have stipulated that the portion of
ceeds allocable to premiums paid after Ja
1941, is includible. The question rema
whether the portion of the proceeds of th
allocable to premiums paid prior to Jar
1941, is includible in the gross estate.

The term "incident of ownership" is n
tax law. Its use in the 1942 Act involves
mental change, however, which reveals that
pose of Congress was to cut "through
avoidance schemes." Paul, Federal Estate
Taxation, 1946 Supp. Section 10.37. The C
Reports on the 1942 Act, 1942-2, Cumulati
tin 491, 677, state that "Incidents of owne
not confined to those possessed by the dece

---

life insurance) is amended to read as follo

"(g) Proceeds of Life Insurance.-

* * *

(c) Decedents to Which Amendment
cable.—The amendments made by subsec
shall be applicable only to estates of decede
after the date of the enactment of this Ac
determining the proportion of the prem
other consideration paid directly or indi
the decedent (but not the total premiums
amount so paid by the decedent on or befo

egal sense." Prior to the 1942 Act, the
s and the cases generally used the term
idents of ownership," see Paul, Federal
Gift Taxation, supra.
t contained the following provision:
Trustor reserves the absolute right to
or cause to be cancelled, and revoke or
to be revoked, any of the insurance poli-
erein referred to, or which may hereafter
led to this Trust, provided that he first
the written consent of any two of the
ing, to wit: The Trustee, David O. Selz-
nd Loyd Wright; provided further, that
any cancellation any cash surrender
received on any such policies, shall re-
n and/or be added to the corpus of this

pondent relies on the following language
ulations 105, Section 81.27 (as amended
239; 1943 Cum. Bul. 1094):
dents of ownership in the policy include,
ample, the right of the insured or his
to its economic benefits, the power to
the beneficiary to surrender or cancel
licy, to assign it, to revoke an assign-
to pledge it for a loan, or to obtain from
surer a loan against the surrender value
policy, etc. The insured possesses an in-
of ownership if his death is necessary to
ate his interest in the insurance, as for

to his estate, or payable as he might
should the beneficiary predecease him

The petitioners contend that if the dec
rendered the policies the proceeds would
the benefit of the trust, not to the decec
respondent contends that this makes no
that the power alone to surrender the po
sufficient incident of ownership.

The insurance policies were made paya
trust and the decedent reserved in the
power to cancel the insurance policies i
obtained the written consent of any two
lowing: The Trustee, David O. Selznick
Wright. But the decedent reserved the
revoke the appointment of the last two n
sons above and to "substitute other perso
true, as the petitioners contend, that the
of the cancelled policies would not immed
crue to the decedent. But those proceeds
invested by the trustee and the income
would go to decedent for his life under
agreement. Further, the decedent reserv
trust, the right to direct the trustee as
vestment of the trust corpus (a part of
canceled policies would become) and the i
directed by the decedent need not be "app
permissible by law for investment of tr
under the laws of the State of California

It is apparent that the decedent could
policies and the proceeds representing the

failure to the decedent's benefit, the in-
efrom (since he reserved the trust in-
ife) would go to the decedent from such
of the proceeds as the decedent chose
The right to receive the income from such
s an "incident of ownership" within the
f the statute.

opinion, the proceeds of the insurance
ocable to premiums paid prior to January
e includible in the decedent's gross estate
provisions of section 811 (g) of the In-
enue Code, and we so hold.

held above that the non-insurance assets
ble under section 811 (c) and the insur-
includible under section 811 (g). In our
is not necessary to consider whether the
assets should be included in the gross
er section 811(c), although it has been
insurance is not includible exclusively
ion 811(g)[7] that is, insurance has been
ve been transferred in contemplation of
r section 811(c). This aspect of the prob-
present here and in our opinion, we have
ith the mandate as to section 811 (c) and
ur discussion above.

ve holdings are dispositive of all of the

terial collected in Paul, Federal Estate
Taxation, 1946 Supp., section 1039, par-
e Committee Report reading: "[Section
amended in 1942] does not constitute the

to consider whether they, or any of ther
cludible under section 811 (d) of the Cod

Decision will be entered under Rule 5

Served November 28, 1950.

The Tax Court of the United Stat
Washington

Docket No. 14985

ESTATE OF MYRON SELZNICK, DEC
BANK OF AMERICA NATIONAL
AND SAVINGS ASSOCIATION, D
SELZNICK, and CHARLES H.
EXECUTORS,

Petitio

vs.

COMMISSIONER OF INTERNAL REV

Respon

DECISION PURSUANT TO MAN

Pursuant to the mandate of the Unit
Court of Appeals for the Ninth Circuit, i
cember 28, 1949, in which it was ordered
judged that the decision of the Tax Cour
June 3, 1949, be vacated and the cause
to the Tax Court for further considerati
light of the amendments of October 25,
Section 811 (c) and also subdivisions (d)

Court satisfactory evidence that the tax paid and on March 30, 1951, the respond- revised computation of tax. Now, there-

and Decided: That there is an overpay- estate tax in the amount of $12,108.22, ount was paid after the mailing of the deficiency.

/s/ ERNEST H. VAN FOSSAN,
Judge.

April 3, 1951.

April 4, 1951.

Tax Court and Cause.]

ON FOR REVIEW BY THE COURT
F REPORT OF A DIVISION

esiding Judge of the Tax Court
United States:

ers respectfully pray that the Presiding ercise the discretion conferred on him by 118(b), I. R. C., and direct that the dum Decision entered in the above pro- n April 3, 1951, be set aside and that be reviewed by the entire Court.

h petitioners do not accept the decision erein on April 3, 1951, and intend to peti-

reflected in the decision. The facts are a

On February 20, 1951, respondent filed
50 recomputation showing an overassessm
sum of $6,273.87. The recomputation furt
as follows (p. 2):

> "*In the event that evidence of pa
> State inheritance taxes in the amoun
> 063.77 is submitted before the expi
> sixty days after the decision of The T
> of the United States becomes final, o
> ment in the amount of $68,337.64 w
> lowed."

On March 26, 1951, petitioners filed
payment of inheritance taxes in the sum
574.84, thereby becoming entitled to the
of an overassessment in the sum of $68,
accordance with respondent's own figures.
sion entered however allows an overasse
only $12,108.22, which seems to be plainly e

We respectfully request that the Apri
decision be reviewed by the Court for the
of correcting the error above referred to.

Respectfully submitted,
/s/ JOSEPH D. BRADY,
/s/ WALTER L. NOSSAM
Attorneys for Petitio

Dated: April 10, 1951.

Received and Filed T. C. U. S. April 1

the United States Court of Appeals
for the Ninth Circuit
Tax Court Docket No. 14,985

Cause.]

PETITION FOR REVIEW

Honorable Judges of the United States
of Appeals for the Ninth Circuit:

tate of Myron Selznick, Deceased, Bank
ca National Trust and Savings Associa-
d O. Selznick and Charles H. Sachs, Ex-
y Joseph D. Brady and Walter L. Nos-
heir attorneys, respectfully petition the
ollows:

I.

Nature of Controversy

lers are executors of the Estate of Myron
who died a resident of Beverly Hills, Cali-
March 23, 1944.

uary 29, 1932, decedent Selznick executed
red a Declaration of Trust in which Citi-
onal Trust and Savings Bank of Los An-
trustee.

uary 29, 1932, decedent transferred to the
ts (other than life insurance contracts)
value on the date of his death of $152,-
cedent also transferred to the trust nine
nce contracts owned by him. The portion

miums paid prior to January 10, 1941, v
805.10.

Respondent in his 90-day letter determ
these transfers by decedent, were includi
gross estate for Federal estate tax purpose
fers "intended to take effect in possessi
joyment at decedent's death" coming "v
provisions of section 811 (c) of the Inter
nue Code."

Petitioners have denied that the trans
intended to take effect in possession or e
at decedent's death because all decedent's
income or other possession or enjoyme
trust assets ended, under the terms of
prior to the date of decedent's death,
therefore the transfers were not includi
section 302 (c) of the Revenue Act of
amended by the Joint Resolution of Marc
(Public Number 131, 71st Congress), w
the law applicable to these transfers, n
section 811 (c), I.R.C.

Petitioners have also contended that the
are not includible in gross estate under
provision of the Internal Revenue Code.

The Tax Court, by order and decisio
June 7, 1949, upheld the determination o
spondent that the transfers were includi
cedent's gross estate. In doing so it reli
upon the decision of the Supreme Cou
United States in Commissioner v. Estate o

n this case, under the trust, the decedent's
ncome ended before his death.

ners duly petitioned the United States Cir-
t of Appeals for the Ninth Circuit to
e Tax Court's decision. After the record
sent to the Court of Appeals, petitioners
ndent entered into a stipulation for re-
he case to the Tax Court for further con-
in view of legislation enacted by Congress
case was pending. Section 7 (b) of P.L.
Congress (1949), amends section 811 (c)
de and makes it applicable to estates of
dying after February 10, 1939. Section
ne 1949 Act further provides that property
d after March 3, 1931, and prior to June
hall not be included in the gross estate
would have been includible by reason of
latory language of the Joint Resolution of
1931 (46 Stat. 1516). This Court remanded
to the Tax Court pursuant to the stipula-
e parties.

hearing of the cause pursuant to remand,
ourt by decision entered April 3, 1951, ad-
its former decision. A timely motion by
s for review by the Tax Court of the
the division rendering the decision was
May 7, 1951.

x Court erred:

olding and deciding that transfers by de-

(with respect to assets other than life
contracts) and of $148,805.10 (with respe
insurance contracts) were includible in
cedent's gross estate for Federal estate tax

2. In holding and deciding that there
deficiency in Federal estate tax based on
said transfers or either thereof in the gro

3. In rendering a decision which, in the
above enumerated, is contrary to the co
law and regulations and is not supporte
evidence in the case.

4. In holding that there was an overpa
the tax in the sum of only $12,108.22 instea
greater sum as would result from not incl
the taxable estate the items mentioned in p
1, above.

II.

Declaration of Court in Which Review I

Petitioners hereby declare that they seek
of the decision of the Tax Court of th
States by the United States Court of Ap
the Ninth Circuit.

III.

Allegations to Establish Venue and Ju

Myron Selznick, the decedent herein, die
dent of Beverly Hills, California, on M
1944. His estate is being administered in
geles County, California. The petitioners

national banking association; David O.
and Charles H. Sachs, are the duly ap-
nd acting executors of the last will and
of Myron Selznick. This case involves
al estate tax liability of petitioners as
of said estate.

n the United States Court of Appeals for
Circuit is established by the fact that
oners' estate tax return (Form 706) was
the Collector of Internal Revenue for the
trict of California, located at Los An-
ch collection district is within the juris-
the Court of Appeals for the Ninth
d by the fact that the parties hereto have
ated that the decision by the Tax Court
eviewed by any Court of Appeals other
ne herein designated.

ition is for a review of the decision by the
holding that transfers to the trust made
cedent on January 29, 1932, in the total
\$152,951.83 and \$148,805.10, respectively,
included in his gross estate, and is filed
to the provisions of sections 1141 and
e Internal Revenue Code.

ore, petitioners pray that the decision of
ourt of the Untied States be reviewed by
l States Court of Appeals for the Ninth
at a transcript of the record be prepared
nce with law and the rules of the Court
nsmitted to the Clerk of the Court for

reviewed and corrected.

Dated: May 21, 1951.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAM

Attorneys for Petiti

State of California,
County of Los Angeles—ss.

W. W. Seward, being first duly sworn,
he is an Assistant Trust Officer of Bank o
National Trust and Savings Association,
banking association, which is one of the
pointed and acting Executors (with Davi
nick and Charles H. Sachs), of the Estate
Selznick, deceased, petitioners on revie
that affiant is duly authorized to verify t
ing petition for review; that affiant has
foregoing petition for review, is familiar
statements contained therein and that
stated are true except as to those facts st
upon information and belief and those
believes to be true.

/s/ W. W. SEWARD.

Subscribed and sworn to before me,
day of May, 1951.

[Seal] /s/ C. H. MICHEL,
Notary Public in and for the County of
geles, State of California.

e Tax Court of the United States

Cause.]

NOTICE

s Oliphant, Chief Counsel for the Bureau
ternal Revenue, and to Theron L. Caudle,
tant Attorney General.

Take Notice that the above-named peti-
ave filed with the Clerk of the Tax
the United States their Petition for Re-
e decision of the Tax Court in the above-
use, a copy of which petition is herewith
on you.

May 25, 1951.

JOSEPH D. BRADY, and
WALTER L. NOSSAMAN

By /s/ WALTER L. NOSSAMAN.

of Copy Acknowledged.

C.U.S. May 25, 1951.

Tax Court and Cause.]

TITIONERS' DESIGNATION OF
ENTS OF RECORD ON REVIEW

rk of the Tax Court of the United States:
ve-designated petitioners, being also the
s on Review, hereby designate for inclu-

ceedings on April 3, 1951, the entire
follows:

1. The documents and records specifie
tioners' Designation of Contents of Reco
view, filed in this Court on or about July
and heretofore transmitted to the Unit
Court of Appeals for the Ninth Circuit.

2. The original exhibits included in
Consideration of Original Exhibits mad
United States Court of Appeals for the N
cuit on or about August 2, 1949.

3. Stipulation dated December 23, 194
the above-named Petitioners and the Co
of Internal Revenue, stipulating that the
made by the Tax Court on April 1, 1949, b
and the cause remanded to the Tax Cour
ther consideration. (Not of Record. See N

4. Order of the United States Court o
for the Ninth Circuit remanding the cau
Tax Court. (Not of Record. See Mandate

5. Decision of the Tax Court promulg
vember 28, 1950.

6. The Tax Court's decision pursuant
date, entered April 3, 1951.

7. Petitioners' Motion for Review by
of Report of a Division, and Order of Ma
denying said Motion.

ppeals.

ce of Filing Petition for Review, together
f of Service thereof and of service of a
e Petition for Review.

tement of Points on which Petitioners
Rely on Review.

s Designation of Contents of Record on

tificate and Seal.

is hereby made that a transcript of said
so far as it was not prepared, certified
nitted in connection with the Petition for
retofore filed in this cause) be prepared,
nd transmitted by the Clerk of the Tax
the United States to the Clerk of the
tes Court of Appeals for the Ninth Cir-
uired by law and the rules of said Court
.

May 28, 1951.

/s/ JOSEPH D. BRADY,

/s/ WALTER L. NOSSAMAN,

Counsel for Petitioners.

and Filed T.C.U.S. May 31, 1951.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of the Tax
the United States, do hereby certify that
going documents, 1 to 24 inclusive, const
are all of the original papers and proce
file in my office as called for by the "De
as to Contents of Record on Review" in
ceeding before the Tax Court of the Unit
entitled "Estate of Myron Selznick, Decea
of America National Trust and Savings As
David O. Selznick and Charles H. Sachs, E
Petitioners, v. Commissioner of Internal
Respondent," Docket Number 14985 and
the petitioner in the Tax Court proceedin
tiated an appeal as above numbered and
together with a true copy of the docket
said Tax Court proceeding, as the same
the official docket book in my office.

In testimony whereof, I hereunto set
and affix the seal of The Tax Court of th
States, at Washington, in the District of
this 11th day of June, 1951.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Cou
United States.

ed]. No. 12580. United States Court of
or the Ninth Circuit. Estate of Myron
Deceased, Bank of America National
Savings Association, David O. Selznick
es H. Sachs, Executors, Petitioners, vs.
ner of Internal Revenue, Respondent.
of the Record. Petition to Review a
f The Tax Court of the United States.

ne 16, 1951.

/s/ PAUL P. O'BRIEN,
he United States Court of Appeals for
nth Circuit.

In the United States Court of App
for the Ninth Circuit

Estate of MYRON SELZNICK, Decease
of AMERICA NATIONAL TRUST
INGS ASSOCIATION, DAVID
NICK and CHARLES H. SACHS,
Petitioners on R

vs.

COMMISSIONER of INTERNAL REV
Respondent on R

STATEMENT OF POINTS ON WHIC
TIONERS INTEND TO RELY ON R

Petitioners hereby designate the fol
the points upon which they intend to r
review of the above proceeding by the Uni
Court of Appeals for the Ninth Circuit:

1. The Tax Court of the United State
deciding that transfers of decedent t
created on January 29, 1932, totaling $
were includible in the decedent's gross
federal estate tax purposes.

2. The decedent did not retain for h
any period not ending before his death, t
sion or enjoyment of, or the income
property thus included in decedent's gr
by The Tax Court.

ate the persons who shall possess or enjoy
erty thus included in decedent's gross
The Tax Court, or the income therefrom.

h respect to none of the property included
nt's gross estate by The Tax Court was
ment thereof as of the date of decedent's
ject to any change through the exercise of
either by the decedent alone, or in con-
vith any person, to alter, amend or revoke.

h respect to life insurance contracts which
art of the property included in the dece-
oss estate by The Tax Court, at no time
uary 10, 1941, did the decedent possess
ent of ownership therein.

Tax Court erred in holding and deciding
was any deficiency in Federal estate tax
including in gross estate said transfers by
of property to said trust.

Tax Court erred in rendering a decision
the respects above-enumerated, is contrary
ntrolling law and regulations, and is not
by the evidence in the case.

May 28, 1951.

/s/ JOSEPH D. BRADY,
/s/ WALTER L. NOSSAMAN,
Counsel for Petitioners on
Review.

IN THE

d States Court of Appeals

FOR THE NINTH CIRCUIT

OF MYRON SELZNICK, Deceased, BANK OF CA NATIONAL TRUST AND SAVINGS ASSOCIA-DAVID O. SELZNICK and CHARLES H. SACHS, ORS,

Petitioners,

vs.

IONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS.

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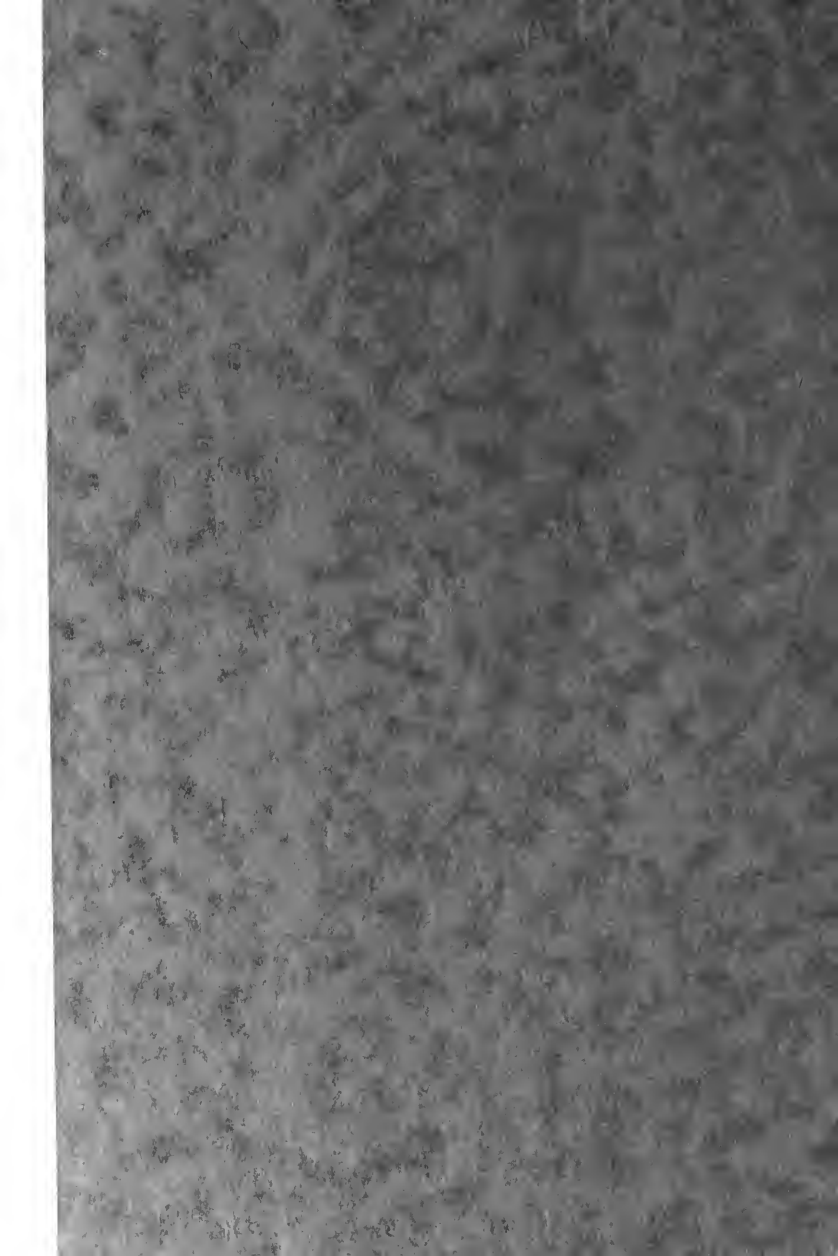

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IOUS POINTS DISCUSSED:

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No. 12980

IN THE

d States Court of Appeals

FOR THE NINTH CIRCUIT

OF MYRON SELZNICK, Deceased, BANK OF A NATIONAL TRUST AND SAVINGS ASSOCIA-DAVID O. SELZNICK and CHARLES H. SACHS, RS,

Petitioners,

vs.

ONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS.

Jurisdictional Matters.

a petition to review a decision of the Tax Court ited States, entered April 3, 1951. Petitioners on filed April 12, 1951, denied by the Tax Court 951, requested that the April 3 decision be re- the Court [Tr. 153-154]. The present peti- eview was filed May 25, 1951 [Tr. 160], and reof was served on respondent's attorneys on [Tr. 161].

Hills, California. Following his death on M
1944, the petitioners, Bank of America Natio
and Savings Association, David O. Selznick an
H. Sachs were appointed and are now the qua
acting executors of his estate. The estate t
(Form 706) was filed with the Collector of Inte
nue for the Sixth District of California, locat
Angeles. The parties have not stipulated that
sion may be reviewed by any Court of App
than this Court.

History of Prior Proceedings in the C

The taxpayers' petition was filed in the Tax
June 23, 1947, and thereafter came on for hea
November 29, 1948. On April 1, 1949, the C
dered its memorandum opinion [CCH Dec. 16
April 1, 1949; P-H TC Memo. ¶49,074; T
which gave effect to certain stipulations prev
tered into by the parties and upon the merits
the case was governed by *Commissioner v.*
Church, 335 U. S. 632, 93 L. Ed. 288, 69 S
decided January 17, 1949.

Pursuant to this opinion, the order and d
the Tax Court finding a deficiency in estate tax
842.44 was entered on June 7, 1949 [Tr. 91].
was duly taken to this Court [Tr. 92 *ff.*].
and prior to any hearing thereon by this Court
pursuant to stipulation of the parties, was re
the Tax Court [Tr. 119-121]. Pursuant to th
the Tax Court considered the case *de novo,*

or different reasons, a summary of which we the syllabus:

, the non-insurance assets transferred to the prior to June 7, 1932, are includible in the dent's gross estate by reason of the amenda- language of the Joint Resolution of March 3, , and Section 811(c) of the Code.

, further, the insurance assets are includible e decedent's gross estate under Section 811(g) ne Code.

: of the Facts of the Case, the Nature of the roversy, the Tax Involved and the Issues to ecided.

se involves an asserted deficiency in estate tax tate of Myron Selznick. The amount of the originally asserted was $384,604.05, arising inclusion in the gross estate of certain addi- ns and the disallowance of certain deductions. he first hearing in the Tax Court, agreements ned by the parties eliminating all except one nely, whether or not all or any part of the nsferred by the decedent prior to June 7, 1932, created by him on January 29, 1932 [Tr. 43- cludible in the gross estate. These items fall ategories:

ets having a value at the date of decedent's $152,951.83, transferred on January 29, 1932, created by decedent on that date [Tr. 40].

received from these contracts were $188,275.31
of which the portion allocable to premiums pa
January 10, 1941, was $148,805.10 [Tr. 41],
portion allocable to premiums paid after that
$39,470.21 [Tr. 41].

There is no dispute as to includibility of ass
ferred to the trust *after* June 6, 1932, having
on the date of decedent's death of $130,817.79 [
nor as to the includibility of the $39,470.21 o
surance proceeds referable to premiums paid a
uary 10, 1941 [Tr. 41, 130]. The controver
Tax Court and here relates solely to the asse
ferred to the trust prior to June 7, 1932, an
part of the proceeds of the insurance (all th
having been assigned to the trust prior to t
which is referable to premiums paid by the dec
rectly or indirectly, prior to January 10, 1941.

A copy of the trust agreement in question
the Court [Ex. 1-A; Tr. 43-66]. Its date, Ja
1932, the Court will observe, is in the interva
the Joint Resolution of March 3, 1931 (which
express terms, by an Amendment to Section 3
the Revenue Act of 1926, taxed irrevocable
serving income to the grantor) and June 6, 19
Congress, to close a "loophole" left by the 193
ment, again amended Section 302(c) (now
811(c), I. R. C.) to include not only those
under which the grantor retained income "fo
or any period not ending before his death" (193
ment), but those in which he retained income

znick trust [Tr. 43-66] contained none of the *dicia* of taxability. It was irrevocable and un-,[1] provided for no reversion, reserved no the grantor to change the enjoyment. Since case hinges on the construction of two or graphs of the trust, we shall reserve further of the trust, and all quotations from it, to riate place in the Argument.

ation of Errors Relied on by Petitioners.

ers rely upon the following points, as to which ed the Tax Court erred:

Tax Court erred in deciding that transfers t to the January 29, 1932 trust totaling $301,- fe insurance $148,805.10, other assets $152,- ere includible in the decedent's gross estate for tate tax purposes.

decedent did not retain for his life, or any t ending before his death, the possession or of, or the income from, the property thus n decedent's gross estate by the Tax Court. 302(c)(1), Revenue Act of 1926, as amended nt Resolution of March 3, 1931.)

h respect to life insurance contracts which rt of the property transferred by the decedent st prior to June 7, 1932, and included in the gross estate by the Tax Court, at no time uary 10, 1941, did the decedent possess any f ownership therein. (Section 811(g), Inter-

nal Revenue Code; see also Section 404(c), Rev
of 1942, as amended by Section 503(a) of the
Act of 1950.)

4. The Tax Court erred in deciding that t
any deficiency in Federal estate tax based on
in decedent's gross estate his pre-June 7, 1932
to the trust.

5. The Tax Court erred in rendering a decisi
in the respects above enumerated, is contrary to
trolling law and regulations, and is not supporte
evidence in the case.

Although the Tax Court found it unnecessar
cuss the applicability to this case of Section 81
ternal Revenue Code [see Tr. 152], we shall
that issue, since the Commissioner is at liberty
upon it, if so advised, in endeavoring to sustain
Court's judgment. Our position regarding t
may be stated as follows:

6. With respect to none of the property tr
by the decedent to the trust prior to June 7, 1
included in decedent's gross estate by the Ta
was the enjoyment thereof as of the date of d
death subject to any change through the exer
power either by the decedent alone, or in co
with any person, to alter, amend or revoke.
302(d), Revenue Act of 1926; Section 81
I. R. C.)

The same comments apply to Section 302(c)
enue Act of 1926, as amended by the Joint

the property or the income therefrom. (See
)

ppendix to this brief, we quote the statutes and
s pertinent to the present controversy; also cer-
essional committee reports which may have a
pon it.

A Preliminary Matter.

proceeding with our main argument, we direct
to a general principle to which full allegiance
os not been accorded in this case. We refer to
hat the taxpayers are not here claiming an ex-
r a deduction, therefore coming within the cases
iat under such circumstances the burden is on
yer to establish his right to the exemption or
claimed. *Interstate Transit Lines v. Commis-*
9 U. S. 590, 593, 87 L. Ed. 1607, 63 S. Ct.
43; deduction); *Commissioner v. Jacobson,* 336
, 49, 93 L. Ed. 477, 69 S. Ct. 558 (1949;
). For a criticism of the rule, see Note, Erwin
old, 56 Harv. L. R. 1142 (1943).

other hand, this is a case where the doubt or
arises from the statute itself and the coordinate
, *leaving it uncertain whether the taxpayer*
hin the scope of the taxing statute at all. Under
umstances, the applicable rule of construction
doubt exists as to the construction of a taxing

Of the numerous cases announcing the rule ju
we note the following: *McFeely v. Commissi*
U. S. 102, 111, 80 L. Ed. 83 (1935); *Old Co*
road Co. v. Commissioner, 284 U. S. 552, 76 L
56 S. Ct. 54 (1932). The Court says (p. 561),
to a discussion just concluded as to meaning of
"interest":

> "If there were doubt as to the connotati
> term, and another meaning might be ado
> fact of its use in a tax statute would incline
> to the construction most favorable to the t
> (Citing authorities.)

In the construction of the 1931 statute (see
1), as applied to the present case, we are
pared to claim for ourselves certainty, nor can
that position to the Commissioner. If it be gra
the case is borderline, we are still in a position
the protection afforded by the salutary principle
to above. The scope of the 1931 amendment is a
restricted. The purpose of the 1932 amendme
reach cases not covered by the 1931 Joint
(see quotation from the Committee reports, Ap
As to other changes made at the same time,
mittees said they were only "clarifying." But
"or for any period not ascertainable without
to his death" (App. p. 1) are not described a
ing. The insertion of these words marked a
the law, intended to include an entire category
fers not theretofore included. We consider i
reasonable to believe that the Selznick trust con

ARGUMENT.

incipal point involved may be condensed into ing: The Commissioner contends that under 29, 1932 trust created by Selznick, he retained e for his life; the taxpayers (petitioners) con- under the terms of this particular trust, his ncome terminated *before* his death, rendering er not taxable under the statute then in effect ch 3, 1931, pre-June 7, 1932).

estions presented in the instant case may be ly discussed under the following outline:

the assets transferred by the decedent to the 9, 1932 trust, prior to June 7, 1932, includible ss estate because of retention by him of the erefrom?

Did the decedent retain the right, either alone unction with any person, to designate the per- shall possess or enjoy the property or the income ?

e any of the transfers made to the January 29, subject to the power of the decedent, either n conjunction with any person, to alter, amend

the proceeds of insurance policies assigned by nt to the January 29, 1932 trust, prior to June cludible in the gross estate?

I.

Are the Assets Transferred by the Deceden January 29, 1932 Trust, Prior to June Includible in the Gross Estate Because c tion by Him of the Income Therefrom?

Matters relating particularly to insurance polic ferred to the trust prior to June 7, 1932, will be under heading No. 3.

The taxability of the pre-June 6, 1932 tra to be governed by Section 302(c) of the Rev of 1926, as amended by the Joint Resolution c 3, 1931 (App. p. 1), and before its amendment tion 803(a) of the Revenue Act of 1932 (Ap Such amendments are not retroactive (*Hassett* page 7, *supra; Estate of Edward E. Bradley,* 518 (1943), aff'd 140 F. 2d 87, 32 AFTR 1(2, 1944).

We have then to consider whether the transf prior to June 7, 1932, come within the following of Section 302(c) (quoted in full, App. p. 1):

> "* * * a transfer under which the t has retained *for his life or any period n before his death* (1) the possession or enjo or the income from, the property * * *.'

Two provisions of the trust [Tr. 43-66] req sideration here. The first is Article VII [Tr. 5

> "This trust is irrevocable. The entire n received and derived from the trust estate able for distribution hereunder shall be by s

, however reserves the right to direct the Trus-
rom time to time to credit, keep and add any
ll income which, pursuant to the terms hereof,
be payable to him, to the principal of the corpus
ie trust estate, by giving written instructions
time to time so demanding."

ier provision important here is the first portion
XIII [Tr. 63]:

*ny income accrued or undistributed at the ter-
tion of any trust or estate hereunder, shall be-
and go to the beneficiary or beneficiaries entitled
e next eventual estate,* in the same proportions
e principal hereof, * * *."

t income was to be "paid monthly or in other
t installments as directed by the Trustor," to
ent. His interest in the trust terminated at his
d income then accrued or undistributed was to
nd go to the beneficiary or beneficiaries entitled
xt eventual estate."

ect of these provisions is, first, that the income
ble to decedent, but only in installments, and
iat there would be some amount of income be-
last installment paid to the decedent and the
is death. This income would go *not to the de-*
it to the beneficiaries next in line.

tual practice conformed with what the trust
icate. The income was in fact paid in install-
e intervals being not less than once a month
ly longer [Ex. 11-K, Tr. 67-68]. On the date

facts, the decedent did *not* retain *"for his lif* period not ending before his death" the "poss enjoyment of or the income from" the property tained the right to income only for a period w to end *before* the end of his life. Therefore, language of Section 302(c), as it read on Jar 1932, the transfer was not taxable.

Our construction of Section 302(c), as am the March 3, 1931 Joint Resolution, is confirme Congressional Committee Report relating to th amendment which was made in 1932 to do away very situation of which a typical instance is here. That construction is also confirmed by lations (App. pp. 6-7). The reports of the Means Committee and Senate Finance Commi App. p. 8) illustrate the *kind* of situation, bu *only* situation which the amendatory Act was in cure (1939-1 C. B., Part 2, pp. 490, 532):

> "(1) The insertion of the words 'or period not ascertainable without referenc death,' is to reach, for example, a transf decedent reserved to himself *semiannual* of the income of a trust which he had es *but with the provision that no part of the come between the last semiannual paymen and his death should be paid to him or h* or where he reserves the income, not neces

s not merely a clarifying amendment—a conclu-
asized by the fact that the above paragraph
l by the following sentence:

ertain new matter has also been added, which
hout retroactive effect." (App. p. 8.)

a series of paragraphs (see App. pp. 8-9) of
e one under consideration is number (1),
s (2) and (3) are described as clarifying
which did not represent new matter, but para-
) and (4) are not so described. Congress
l what it was doing. It knew that the change
o the requirement of income for life was new
t could not be applied to transfers before June

ion 105, Section 81.18 (quoted App. pp. 6-7)
illustration the case of income reserved, paya-
rly, with income after the last of such install-
ng to a succeeding interest, inferring that such
s not fall within the language of the 1931 Joint
. (The inference was perhaps plainer prior
arch 8, 1951 amendment to Section 81.18, but
ng of the present regulation is believed to be
) A transfer of the type just mentioned is
ly when made *after* June 6, 1932.

ars then that both Congress and the Treasury
gnized that situations of a type closely re-

exact period of the installment payments prov
by the trust has no significance. The Congressio
mittees mention semi-annual installments and th
ury Regulations mention quarterly payments.
months difference was not considered import
principle, there can be no difference between thre
or six months and the monthly or other conve
stallments provided for in the Selznick trust.
one case as in the other, the title to the income
after payment of the last installment to the trust
in him or his estate.

Does it make any difference that the income
be "paid monthly or in other convenient install
directed by the Trustor"? We submit that it
because no direction of the trustor given pursua
authorization could direct the income to be pa
than in installments. "Installment" is defined
ster's New International Dictionary, Second Ed
follows:

> "A portion of a debt or sum of money
> divided into portions that are made payabl
> ferent times."

It is plain both from the common sense unde
of the term installment and the dictionary defin
the income had to be payable in "portions" and t
portions had to be "payable at different times."

The trustee was evidently unwilling to give the blanket authority respecting the interval be- tallments. "Monthly" is considered typical or e, but "convenient" is established as a controlling any event.

actical construction put upon the provision be- parties over a long period of years, making the ayable not more often than monthly [Ex. 11-K,], is in accordance with this construction. In er periods elapsed in most instances. For ex- payment was made between September 3, 1937, 11, 1940, nor between November 8, 1940, and , 1942, that being the last payment received by r [Ex. 11-K, Tr. 67-68].

he fact that the income was payable only in ts, it follows that an interval had to elapse be- date of the last installment and the death of ent. This income, pursuant to Article XIII, to the decedent or his estate, but to the next nterest under the trust, thereby preventing the of the retention by the decedent "for his life eriod not ending before his death" of the in- n the property.

heading No. 2, we shall recite something of y of what are now Sections 811(c) and (d) of nal Revenue Code (formerly Sections 302(c)

in these statutes as they were originally enacte
they were amended from time to time. The c
these gaps by Congress was necessitated by the
the courts did not anticipate the will of Congre
dertake by construction to write into the law an
which was not expressed, but on the contrary
the statutes as they were written even though
was in some cases to grant tax benefits which
ernment hoped and desired, perhaps intended, s
be conferred. So here, the March 3, 1931 Jo
lution was intended to close the very considera
hole" left by *May v. Heiner,* 281 U. S. 238, 7
286, 50 S. Ct. 286 (1930), reaffirmed in *Mo*
Burnet, 283 U. S. 783, 75 L. Ed. 1412, 51 S
(Mar. 2, 1931). See *Hassett v. Welch, supra*
which reviews the history of the Joint Resolut
have referred to this case (p. 7, *supra*) on
that doubts—*and regarding this very statute*—
resolved in favor of the taxpayer. Whatever
with which the Joint Resolution of March 3,
passed, it failed to cover the situation where alt
come was reserved by the grantor, the reserva
for a period *less* than his life, leaving the in
rived from the transferred property between th
the last payment to him and the date of his
someone other than himself or his estate. A
we have the unimpeachable testimony of both

te upon this ground unless recent events have
he law in a respect unfavorable to trusts of this

rings us to *Commissioner v. Church,* cited page
upon which the Commissioner continued to
e Tax Court, even after it had been overruled
troactive application, by the 1949 legislation
section (b) of that Act, quoted App. p. 3).
t of that statute is that the retention of income
in the case of a decedent dying, as Selznick did,
January 1, 1950, apply to

2) a transfer made after March 3, 1931, and
to June 7, 1932, unless the property transferred
d have been includible in the decedent's gross
e by reason of the amendatory language of the
resolution of March 3, 1931." (App. p. 3.)

tatute puts the law back exactly where it was
e *Church* case was decided as far as the present
ncerned. Except hesitantly and subject to doubts
ingenuity can dispel, it cannot be said that the
transferred by Selznick was includible by rea-
ne amendatory language of the Joint Resolution
n 3, 1931. It follows that the Selznick trust,
within the 15-month interval between March 3,
l June 7, 1932, does not constitute a part of his
ate for estate tax purposes. We are speaking

II.

(a) Did the Decedent Retain the Right, Eithe
or in Conjunction With Any Person, to
nate the Persons Who Shall Possess or
the Property or the Income Therefrom?

(b) Are Any of the Transfers Made to the
29, 1942 Trust Subject to the Power of
cedent, Either Alone or in Conjunction W
Person, to Alter, Amend or Revoke?

These two points are governed by the same co
tions and will be discussed together.

The trust in express terms is irrevocable [s
VII, Tr. 53]. The trustor reserves the power t
investments during his lifetime [Art. III, Tr.
His consent is also required to the improvement
property subject to the trust [Art. III, Tr. 4
reserves the right to change or substitute from
time the charitable institutions which are given
gent rights in remainder [Art. VIII, Tr. 58]
the consent of any two of the following, nam
trustee, David O. Selznick, and Loyd Wright,
cause insurance policies to be cancelled, the ca
render value received on cancellation to be adde
corpus of the trust [Art. XI, Tr. 62].

As to the power to change the charitable co
remaindermen, this would be an exempt powe

eserved, all of them administrative, are of no
ıce as far as the present issue is concerned
e v. Northern Trust Co., 278 U. S. 339, 73
410, 49 S. Ct. 123, 7 AFTR 8841 (1929);
H. S. Downe, 2 T. C. 967 (1943; app. dism.
; *Estate of Geo. W. Hall,* 6 T. C. 933 (1946;
Prange's Will, 201 Wisc. 636, 231 N. W. 271

ıly provision which can evoke controversy is the
, constituting the first paragraph of Article XI
:

Notwithstanding the fact that this Declaration
Trust is irrevocable, the Trustor, for himself and
behalf of the beneficiaries, reserves the right to
ion any court of competent jurisdiction at any
and from time to time to amend and/or con-
e the same; provided, however, that no amend-
t shall change the provisions of this trust which
have the effect or which is intended to or shall
e the same to be construed to be or amend it to
revocable trust rather than an irrevocable one."

stee is entitled to petition a court to amend or
the trust. Not only trustees but individuals may
the Court to do anything, although the Court
accede to their petitions. The reserved power to
is nothing more than would be implied in the
of a provision for it. The law writes such a

tation from *Estate of Van Deusen,* 30 Cal. 2d 2
182 P. 2d 565 (1947):

> "* * * A court of equity may modify
> on a proper showing of changed conditions c
> after the creation of a trust if the rights o
> beneficiaries may be protected. (*Whittin*
> *California Trust Co.,* 214 Cal. 128, 134 [
> 142]; *Adams v. Cook,* 15 Cal. 2d 352, 358
> 2d 484]; *Moxley v. Title Insurance & Trust*
> Cal. 2d 457, 466-467 [165 P. 2d 15]; s
> Trusts, Secs. 167, 168; Scott on Trusts, Se
> 168.)"

Similarly, a Court of equity has power to "c
a trust. In *Curtin v. Krohn,* 4 Cal. App. 131,
Pac. 243 (1906), the Court said:

> "A trustee may always apply to a court c
> for aid or directions, and such courts are
> open to any of the other parties when a di
> to the existence, character, or terms of
> arises."

Restatement, Trusts, Section 259, Comment *a.*

> *"a. When trustee entitled to instructio*
> trustee is entitled to instructions of the
> respect to such matters as the proper con
> of the trust instrument, the extent of his
> and duties, who are beneficiaries of the t
> character and extent of their interests, the a
> or apportionment of receipts or expenditures
> principal and income, the persons entitled t
> come or to the trust property on the termi

trustee to incur the expense of making the ap-
tion (see Sec. 245)."

ction 165, Comment *i:*

. *Application to court.* If the trustee is in doubt
ther performance is possible, he may apply to
proper court for instructions (see Sec. 259). The
t will direct or permit the trustee to deviate
n a term of the trust if it appears to the court
compliance is impossible."

ction 167, Comment *a:*

. *Change of circumstances.* If owing to cir-
stances not known to the settlor and not antici-
d by him compliance with a specific direction
he settlor would defeat or substantially impair
accomplishment of the purpose of the trust, the
t will permit or direct the trustee not to comply
the specific direction. This is true even though
provided by statute that every conveyance by
trustee in contravention of the trust shall be
lutely void."

authorities: *Peach v. First National Bank,* 247
, 25 S. 2d 153 (1946); *Security-First National*
Millar Realty Co., 217 Cal. 277, 18 P. 2d 339
Hallinan v. Hearst, 133 Cal. 645, 66 Pac. 17
Gibault Home v. Terre Haute First National
27 Ind. 410, 85 N. E. 2d 824 (1949); see also
Trusts, Sections 165, 167, 259.

nnot be certain as to the reasons for the inser-
the trust of the first sentence of Article XI

problems arising under the trust to a Court fo
mination. This relates to procedure only, not to
tive rights. In the *Van Deusen* case, *supra,*
ceeding was initiated by the beneficiaries, not
trustee. Although the relief was not granted,
cedure was regarded as proper.

Similarly, and further illustrating the point
trustor's reservation concerns procedural matte
we note the matter of suits for redress of brea
trusts. Although such suits are ordinarily bro
the beneficiary, we have the authority of the
Court of the United States for the proposition
trustor can maintain an action for relief in such
Justice Cardozo says in *Burnet v. Wells,* 289 U.
679-680, 77 L. Ed. 1439, 53 S. Ct. 761 (1933):

> "* * * The rights and interests ther
> taking out a life insurance policy] generated
> inhere solely in those who are to receive
> ceeds. They inhere also in the insured wh
> operation with the insurer has brought the
> into being. If the Minneapolis Trust Comp
> trustee, were to refuse to apply the incom
> preservation of the insurance, the insured
> maintain a suit to hold it to its duty."

Other cases recognizing the rights of the trusto
such circumstances are *Carr v. Carr,* 185 Ia. 1
N. W. 785 (1919); *Abbott v. Gregory,* 39 M
(1878).

There is nothing in Article XI which atte

make no difference. The decedent had no leg-
ower. He could confer no power on the Court
id not already have. And the power, wherever
rom, was in the Court and not in the decedent.
ord in Article XI or elsewhere in the trust re-
y power *to the decedent* to amend or take any
ion with respect to possession or enjoyment of
rty placed in this irrevocable trust—a point em-
by being twice mentioned in the first sentence
e XI.

vering v. Helmholz, 296 U. S. 93, 80 L. Ed. 76,
68 (1935), the Supreme Court made it clear that
on of this kind, merely permissive of what can be
ler the state law without such a provision, does
il taxability. In that case the question arose
ction 302(d) with respect to a provision in the
t all beneficiaries acting together, by signing a
could revoke it. Holding that this did not make
e, the Court said (p. 97):

* * * This argument overlooks the essential
rence between a power to revoke, alter, or amend,
a condition which the law imposes. The general
is that all parties in interest may terminate the
t. *The clause in question added nothing to the
ts which the law conferred.* Congress cannot
as a transfer intended to take effect in posses-
or enjoyment at the death of the settlor a trust

The history of Sections 302(c) and 302(d) 1926 Act (now Secs. 811(c) and (d), I. R. C. that in the process of broadening the application sections, the attention of Congress has been solely to the activity of *persons,* not of *courts.* the 1924 Act, trusts amendable or revocable o the consent of persons adversely interested were of the taxable estate. *Reinecke v. Northern Tr* 278 U. S. 339, 73 L. Ed. 410, 49 S. Ct. 123, 7 8841 (1929); *Blackman v. United States,* 48 Fe 362, 30 AFTR 846 (1943); *Estate of Frederick* 45 B. T. A. 120 (1941; acq.; app. dism. C. *Estate of Abraham Koshland,* 11 T. C. 904, 910 aff'd 177 F. 2d 859 (C. A. 9, 1949).

The 1924 Act made transfers taxable where joyment was subject "to any change through t cise of a power either by the decedent alone or junction with any person to alter, amend, or rev

We have already commented under heading N the drastic effect of the change made by the Joi lution of March 3, 1931, whereby transfers with reserved for the life of the grantor were brough the Act; also upon the June 6, 1932 amendment to include a limited class of transfers not brough the 1931 amendment.

The 1936 amendment to Section 302(d)(1)

or's death "to any change through the exercise
er (*in whatever capacity exercisable*) by the
alone or by the decedent in conjunction with
on * * * to alter, amend, revoke *or termi-*
The italicized words were added to overcome
of *White v. Poor,* 296 U. S. 98, 80 L. Ed. 80,
66 (1935),[2] and *Helvering v. Helmholz,* 296
80 L. Ed. 76, 56 S. Ct. 68 (1935), *supra.*

bear emphasis that these various changes were
to place additional impediments in the way of
persons over the trust or other transfer after
ade and to make sure, not only that no benefits
reserved by the grantor, but that he could not
neans or in any capacity, whether acting alone
njunction with other persons, adverse or not,
any way the enjoyment of the property or its
olution. In this series of amendments designed
the authority and privileges of *persons* respect-
fers, there is no suggestion that Congress in-
any way to abridge, if it *could* do so, the powers
urts of equity have immemorially exercised over
modifying or even terminating them when the
te conditions exist.

ourt's powers were not enlarged by the privilege
e decedent superfluously reserved. The case is
er for the government than that class of cases

where the grantor has conferred wide disc
powers, *not on a Court but on a "person"*—a
of such character that *the trustor himself* migh
beneficiary. And yet the government has co
lost those cases where the benefits which co
might return to the grantor were such that th
be enforced by no process of law, but were c
as the trustee in the exercise of an uncontrolle
tion might give him.

In *Commissioner v. Irving Trust Co. (Beugler*
147 F. 2d 946, 33 AFTR 759 (C. A. 2, 19
trust specified that the trustee in its absolute d
should have power to pay to the trustor any am
of the corpus of the trust, over a certain minimu
was to be retained. The trust was held not
under Section 302(c) of the 1926 Act, the Cou
(p. 949):

> "In a case where the return of any par
> corpus to the settlor will depend solely upon
> cretion of the trustee the true test as to its
> in the taxable estate of the settlor is wh
> trustee is free to exercise his untrammelle
> tion, or whether the exercise of his disc
> governed by some external standard which
> may apply in compelling compliance with t
> tions of the trust instrument. If the for
> corpus is not subject to taxation as a par

Estate of Louis Stewart (T. C., Jan. 22, 1945) . 14,338(M), 4 T. C. M. 59, app. dism. C. A. *Estate of Milton J. Budlong,* 7 T. C. 756, 762 aff'd and rev'd on other grounds; *Industrial v. Commissioner,* 165 F. 2d 142, 36 AFTR A. 1, 1947); *Estate of Walter E. Frew,* 8 0, 1244 (1947; acq.).

le is different where the trust sets up an "ex- ndard" to which the trustee can be compelled m. *Estate of Virginia H. West,* 9 T. C. 736 aff'd on another point; *St. Louis Union Trust ommissioner,* 173 F. 2d 505 (C. A. 8, 1949).

present case, there is not, nor can there be any standard" to which a Court must conform in on a petition by Selznick. We repeat that so ection 811(c) is concerned, the case is far for the taxpayer than the *Irving Trust Co.* cases cited above.

imilar to the above have been applied where a amend *or terminate* has been conferred, the ng agency being independent, not subject to the control. *Hugh M. Beugler Trusts,* 2 T. C. d *Irving Trust Co. v. Commissioner, supra; Edward Lathrop Ballard,* 47 B. T. A. 784 cq.), aff'd *per cur.* 138 F. 2d 512, 32 AFTR

III.

Are the Proceeds of Insurance Policies Assi the Decedent to the January 29, 1932 Tru to June 7, 1932, Includible in the Gross

What we have been saying applies also to t ance in so far as it is involved under Section and (d). In addition, Section 811(g) of the Co pp. 4-5), dealing expressly with life insurance, to be considered.

We shall here (A) consider the effect of th provisions; (B) analyze the effect of the tra decedent of the insurance to the trust; and (C) s by such transfers decedent retained no incident c ship in the insurance. These subjects will be in order.

A. Effect of the Taxing Provisions.

Under Section 811(g)(2), quoted App., pages insurance is includible in the gross estate if (A) paid the premiums thereon, or (B) possessed at any of the incidents of ownership. Since Myron paid the premiums indirectly (see Reg. 1 81.27(a)), the taxability of the insurance pro pends upon the applicability of Section 404(c Revenue Act of 1942, amended by Section 5(the Revenue Act of 1950 (App. p. 5). Tha provides that as to the portion of the proceeds at

ship in the insurance. (It is agreed that the
f the insurance attributable to premiums paid
ıary 10, 1941, is taxable [Tr. 41].)

fect of the statute is that the insurance in the
rust attributable to premiums paid before Janu-
941, will be excluded from the gross estate so far
811(g) is concerned *if the decedent had no inci-
wnership therein after January 10, 1941.* We
endeavor to establish that fact.

of Decedent's Transfer of Insurance to the Trust.

cedent transferred to the trust on January 29,
e insurance contracts having a total face value
00 [Tr. 40]. These transfers, by various forms
ment, all gave ownership outright to the trustee,
no rights to the trustor.

gal effect of the transfer of the insurance con-
ust be determined from both the documents of
[assignments; Exs. 2-B to 10-J, incl., referred
] and the language of the trust itself [Ex. 1-A,
3]. We shall first consider the effect of the
nts and then the trust.

signments vary somewhat in language but not
egal effect. The operative language of some of
nments appears on standard insurance company
d is simple and direct. It is approximately as

hereby assign, transfer and set over to Citi-
National Trust and Savings Bank as Trustee

This general form is used with respect to the
insurance contracts:

Mutual Life	$25,000	Exhibit 2
New York Life	25,000	Exhibit 3
New York Life	25,000	Exhibit 4
New York Life	50,000	Exhibit 5

The New York Life assignments contain
authority to the assignee to sell or surrender th

The remaining insurance contracts, listed bel
assigned by a special form which has the same
that above described—they represent a complete
of all the right, title and interest of the dece
addition, they contain more specific language
power of the assignee to exercise all options,
the policy, etc. The insurance contracts for w
assignment form was used are:

Peoples Life	$25,000	Exhibit
Peoples Life	25,000	Exhibit
Indianapolis Life	10,000	Exhibit
Indianapolis Life	10,000	Exhibit
Indianapolis Life	5,000	Exhibit

The various assignments involved do not diffe
legal effect. All of them are absolute, valid a
ocable, constituting the assignee the legal owne
purposes.

Life insurance policies may be transferred in C
At the time of these transfers, California Ci
Section 2764, provided as follows:

n may recover upon it whatever the insured have recovered."[3]

van v. Union Oil Co. of California, 16 Cal. 2d 105 P. 2d 922 (1940), the Supreme Court of said:

either insurance policies nor rights arising there- are either sacred or 'untouchable.' As far as nt consideration is concerned, an insurance policy a form of contract. An insurance policy in contemplation is property, which can be sold, ned or bequeathed by the owner thereof."

same effect: *Lewis v. Reed,* 48 Cal. App. 742, 341 (1920); *Blethen v. Pacific Mutual Life In-o.,* 198 Cal. 91, 98, 243 Pac. 431 (1926).

nents containing no restrictions or limitations cable and serve to put the assignee in the posi- e assignor as the complete owner, with all his privileges under the policy.

S., Sec. 435a, p. 59:

ne operation and effect of an assignment of an ance policy are in general, governed by the rules ning to other assignments. The effect of an nment on the insurance contract is controlled e terms and the circumstances of the contract signment itself. *In the absence of any limitation e assignment, it passes to the assignee all the of insured,* but the assignee can acquire no er rights than the assignor had at the time of ssignment." (Emphasis supplied.)

45 C. J. S., Sec. 435b, pp. 59-60:

"Under the general rule relating to as
the assignee of a life insurance policy sta
place of the assignor, acquires no other
rights than the assignor possessed, and
policy subject to all the stipulations and
in the contract of insurance, and subject
fenses available at the time of the assign

"*Reservation or absence of reservation
to revoke.* The assignee of life policies
any reservation in the assignment of polic
right to revoke the assignment, acquires
right, and assignment of life policies with
to revoke an assignment gives the assigne
right immediately on the assignment subjec
titure.

"*Absolute assignment.* An absolute a
ditional assignment divests insured of all
title to the policy, and vests the benefici
in the assignee. The assignor or his repr
are no longer in control of, or interested in
or its proceeds, nor does the death of th
restore title to insured."

Among the many cases applying the rules st
are the following:

In *Anna Rosenstock,* 41 B. T. A. 635, 637-6
acq.), the Board held that insurance policies
subject to estate tax where the decedent had
them to his wife under circumstances which
an assignment. The Board said:

by made a completed, valid and effectual assign-
thereof to her. [Citing cases.] *By such un-
tional assignment the insured was divested of
gal interest in those policies. Also, by such
nsured's right, reserved in the policies, to change
beneficiary was abrogated.*" (Emphasis sup-
)

: *Guaranty Trust Co. of New York (David
Estate),* 33 B. T. A. 1225, 1227 (1936; non-
ncoln *National Life Insurance Co. v. Scales,*
582 (C. A. 5, 1933); *Frick v. Lewellyn,*
803, 810, 4 AFTR 4382 (D. C. Pa., 1924),
ellyn v. Frick, 268 U. S. 238, 69 L. Ed. 934,
487 (1925).

authorities establish that by the assignments
completely divested himself of all ownership
in the contracts, retaining no incident of owner-

ll now consider the provisions of the trust per-
the insurance.

nary statement [Ex. 1-A, Tr. 43]:

* * said Trustor has assigned to the said
tee, as Trustee, certain insurance policies, a
ule of which is attached hereto, marked Exhibit
and by this reference made a part hereof as if
n fully set forth."

II [Ex. 1-A, Tr. 44]:

he Trustor agrees that as to the insurance pol-
delivered to the Trustee or which may hereafter

under to be made payable to the Trustee by
designation as beneficiary thereof, or in s
manner as the parties hereto and any insu
agree, and the Trustee assumes no responsi
the sufficiency or effect of any instrument
ment by which any policy shall be made p
it."

Second paragraph, Article XI [Ex. 1-A, Tr

"The Trustor reserves the absolute right
or cause to be cancelled, and revoke or ca
revoked, any of the insurance policies herei
to, or which may hereafter be added to th
provided that he first obtain the written c
any two of the following, to wit: The
David O. Selznick and Loyd Wright; prov
ther, that upon any cancellation any cash
values received on any such policies, sha
in and/or be added to the corpus of this T

It appears therefore that Selznick assigned th
to the trustee and retained no rights in them
right with the consent of two independent p
cause the policies to be cancelled or "revoked,"
case the surrender values were to remain pa
corpus of the trust in which decedent had no r
than the then innocuous right to income, limi
have said. This amounted only to a change in
of the investment of this particular part of the
maintain that this single power retained by th
was merely administrative, coming within the
on retention of administrative powers cited al

is no all-inclusive definition of "incidents of ." The regulations (Reg. 105, Sec. 81.27(a) provide (in part):

or the purposes of this section, the term 'inci- of ownership' is not confined to ownership in echnical legal sense. For example, a power to ge the beneficiary reserved to a corporation of n the decedent is sole stockholder is an incident vnership in the decedent. For examples of 'in- ts of ownership' see paragraph (c) of this sec-

* * * * * * * *

n determining whether the decedent possessed ncident of ownership in a policy or in any part policy, regard must be given to the effect of State or other applicable law upon the terms of olicy. * * *"

c) * * *

ncidents of ownership in the policy include, for mple, the right of the insured or his estate to conomic benefits, the power to change the bene- y, to surrender or cancel the policy, to assign revoke an assignment, to pledge it for a loan, obtain from the insurer a loan against the sur- er value of the policy, etc. The insured pos- s an incident of ownership if his death is neces- to terminate his interest in the insurance, as,

The examples given bring out in bold relief th
of any comparable situation here. We need n
the Court's time in checking off the enumerated
one by one. That none of them is present her
Since the insured's divestment of all interest in t
was absolute, he had no interest for the termi
which his death was necessary. The regulati
does not apply.

In *May Billings et al., Executors,* 35 B. T.
(1937; acq.), decedent had insurance of whic
irrevocably designated the beneficiary (equival
assignment). He did have a right, however, to
when the proceeds of the policy should be pa
beneficiary. Holding that the policies were no
the decedent having no interest in them, the B
(p. 1152):

> "* * * The mere right to say when th
> of the insurance policy should be paid to
> ficiary does not amount to a control of the
> They irrevocably belonged to the benefic
> the date the policies were taken out."

The right retained here—the equivalent of
control investments—is farther from an "in
ownership" than was the right retained in th
case. Under our Point 2, we have shown that
to control investments in a trust is not su
bring the trust into the taxable estate (see
supra).

That an assignment of insurance contracts

e of Louis J. Dorson, 4 T. C. 463 (1944; acq.), (C. A. 2, 1945), the decedent transferred surance policies to a trust which was ir- and in which he retained no property rights o change beneficiary interests. Concluding that nt had divested himself of all the incidents of the Court said (pp. 468, 469):

s to the policies here under consideration, our on is whether by transferring them to the es under the trust agreement decedent irrev- divested himself of all property rights in them, ling the right to change the beneficiaries or to e or surrender the policies. If so, then the eds of the policies must be excluded from his estate. See Anna Rosenstock, 41 B. T. A. and cases therein cited.

* * * * * * * *

the instant case we think that the uncondi- and irrevocable assignment of the policies to ustees divested decedent of all the rights therein, ling the right to change the beneficiaries."

rson case was followed in *Estate of George F.* C. 681, 687 (1947; acq.).

te of Charles Delany, 1 T. C. 781 (1943), ad transferred insurance in trust for his daugh- e trust was irrevocable and no right to alter was retained. The transfer was held not

Point National Bank, Executor, 39 B. T. A.

from the decedent certain insurance policies. Th
failed to assign to the trustee all the insuran
he owned and those not assigned were held in
the estate. He did, however, assign irrevoc
of the policies and these were held to be not ta
decedent having parted with the incidents of
The Court said (p. 355):

> "* * * The insured had no rights
> those policies after the date of assignment
> when the name of the beneficiary was
> changed."[4]

In *Pennsylvania Co. v. Commissioner,* 79 F
16 AFTR 638 (C. A. 3, 1935), cert. den
S. 651, decedent had named his wife as
of the insurance and reserved no power to c
beneficiary. Having determined that the wi
vested interest in the policy, and that the dece
out the consent of his wife as beneficiary, could
the beneficiary, surrender the policy or borr
thereon, the Court held that the insurance w
cludible in the estate.

Other cases including the proceeds of assign
from the taxable estate because of the absen
dents of ownership are: *Thomas C. Bosw
Executors,* 37 B. T. A. 970 (1938; acq.); *A
stock,* 41 B. T. A. 635 (1940; acq.); *Estate*

---

[4]Held also, the mere right of decedent to receive
after the assignment did not make the transfer subje

son, 41 B. T. A. 901 (1940; non-acq.), app. A. 1, 1940; *Estate of James W. Henry,* ec. 12, 936-G (T. C., Jan. 16, 1943), app. dism. 943.

Conclusion.

regoing will perhaps serve to point out the theories and lines of authority on which the rely to exclude the January 29, 1932, trust. ttempting to anticipate the contentions to be behalf of respondent, it seems proper to rest ng argument here, submitting that the case ome within the taxing act as it stood on Janu- 32.

Respectfully submitted,

JOSEPH D. BRADY,
WALTER L. NOSSAMAN,
Attorneys for Petitioners.

APPENDIX.

Statutes.

302(c), Revenue Act of 1926, as amended by Resolution of March 3, 1931 (in part):

the extent of any interest therein of which ecedent has at any time made a transfer, by or otherwise, in contemplation of or intended e effect in possession or enjoyment at or after eath, including a transfer under which the eror has retained for his life or any period nding before his death (1) the possession or ment of, or the income from, the property or he right to designate the persons who shall s or enjoy the property or the income there-

* * *."

302(c) was again amended by the Revenue 32, effective June 7, 1932, to read as follows:

) To the extent of any interest therein of the decedent has at any time made a transfer, ust or otherwise, in contemplation of or in- l to take effect in possession or enjoyment at ter his death, or of which he has at any time a transfer, by trust or otherwise, under which s retained for his life or for any period not ainable without reference to his death or for eriod which does not in fact end before his (1) the possession or enjoyment of, or the

Section 302(c) of the 1926 Act became Secti
of the Internal Revenue Code and was again
by subsection (a) of the Technical Changes Ac
(October 25, 1949) to read as follows:

"(c) TRANSFERS IN CONTEMPLATION OF,
ING EFFECT AT, DEATH.—

"(1) GENERAL RULE.—To the extent
terest therein of which the decedent has a
made a transfer (except in case of a bon
for an adequate and full consideration in
money's worth), by trust or otherwise—

"(A) in contemplation of his dea
transfer of a material part of his p
the nature of a final disposition or d
thereof, made by the decedent within
prior to his death without such con
shall, unless shown to the contrary,
to have been made in contemplation
within the meaning of this subchapt

"(B) under which he has retained
or for any period not ascertainabl
reference to his death or for any pe
does not in fact end before his deat
possession or enjoyment of, or the ri
income from, the property, or (ii)
either alone or in conjunction with a
to designate the persons who shall
enjoy the property or the income the

"(C) intended to take effect in po
enjoyment at or after his death."

graph (2) Transfers Taking Effect at Death—Prior to October 8, 1949.

paragraph, intended to modify the rule estab-*Estate of Spiegel v. Commissioner,* 335 U. S. d January 17, 1949, is omitted since it will not that the effect of that statute is to remove the se from the rule of the *Spiegel* case, if that otherwise be applicable because of possible by operation of law.

on (b) of the Technical Changes Act (in part):

) The amendment made by subsection (a) shall plicable with respect to estates of decedents after February 10, 1939. The provisions of n 811(c) of the Internal Revenue Code, as ed by subsection (a), shall (except as otherspecifically provided in such section or in the ing sentence) apply to transfers made on, beor after February 26, 1926. The provisions ction 811(c)(1)(B) of such code shall not, in se of a decedent dying prior to January 1, apply to—

(1) a transfer made prior to March 4, 1931;

(2) a transfer made after March 3, 1931, nd prior to June 7, 1932, unless the property ransferred would have been includible in the ecedent's gross estate by reason of the amenda-

Section 811(d) of the Internal Revenue Co

"(d) Revocable Transfers—

"(1) Transfers After June 22, 193
extent of any interest therein of which th
has at any time made a transfer (except
a bona fide sale for an adequate and full
tion in money or money's worth), by trus
wise, where the enjoyment thereof was
the date of his death to any change th
exercise of a power (in whatever capacity e
by the decedent alone or by the decedent i
tion with any other person (without regar
or from what source the decedent acq
power), to alter, amend, or revoke, or wh
cedent relinquished any such power in co
of his death, except in case of a bona fi
an adequate and full consideration in
money's worth. Except in the case of
made after June 22, 1936, no interest
cedent of which he has made a transfe
included in the gross estate under para
unless it is includible under this paragraph

Section 811(g) of the Internal Revenue
amended by the Revenue Act of 1942:

"(2) Receivable by Other Benef
To the extent of the amount receivable b
beneficiaries as insurance under policies
life of the decedent (A) purchased with
or other consideration, paid directly or
by the decedent, in proportion that the
paid by the decedent bears to the total pre

ction with any other person. For the pur-
of clause (A) of this paragraph, if the de-
transferred, by assignment or otherwise, a
of insurance, the amount paid directly or in-
by the decedent shall be reduced by an
t which bears the same ratio to the amount
irectly or indirectly by the decedent as the
eration in money or money's worth received
decedent for the transfer bears to the value of
icy at the time of the transfer. For the pur-
of clause (B) of this paragraph, the term 'in-
of ownership' does not include a reversionary
t."

404(c), Revenue Act of 1942, as amended by
3(a), Revenue Act of 1950 (in part):

) Decedents to Which Amendments Appli-
—The amendments made by subsection (a)
e applicable only to estates of decedents dying
the date of the enactment of this Act [Octo-
, 1942]; but in determining the proportion of
emiums or other consideration paid directly
irectly by the decedent (but not the total pre-
paid) the amount so paid by the decedent on
ore January 10, 1941, shall be excluded if at
ne after such date the decedent possessed an
nt of ownership in the policy. For the pur-
of the preceding sentence, the term 'incident
nership' includes a reversionary interest only
at some time after January 10, 1941, the
of such reversionary interest exceeded 5 per
n of the value of the policy, and (2) the re-
nary interest arose by the express terms of

or the proceeds of the policy, (A) may
the decedent or his estate, or (B) may
to a power of disposition by him."

[Part relating to valuation of r
interests omitted.]

REGULATIONS.

Reg. 105, Section 81.18 (as amended by T
March 8, 1951, to reflect changes made by th
Changes Act of 1949):

"TRANSFERS WITH POSSESSION OR E
RETAINED—*(a) General Rule.* Except i
of a bona fide sale for an adequate an
sideration in money or money's wor
811(c)(1)(B) requires the inclusion in
estate of the value of all property transfe
decedent, whether in trust or otherwise,
cedent retained or reserved the use, posse
to the income, or other enjoyment of the
property (1) for his life; or (2) for any
ascertainable without reference to his dea
for such a period as to evidence his int
it should extend at least for the durat
life and his death occurs before the ex
such period. Except as provided in para
of this section, such property is includi
regard to the date when the transfer
whether before or after the enactment of t
Act of 1916.

servation of the right to receive, in quarterly
ıts, the income of the transferred property
none of the income between the last quarterly
ıt and the decedent's death was to be received
or his estate.[3] This expression also included
vation of the right to receive the income from
rred property after the death of another per-
ıo in fact survived the decedent; but in such
the amount to be included in the gross estate
this section does not include the value of the
ıding income interest in such other person.
er, if such other person predeceased the de-
the reservation may be considered to be for
edent's life or for such a period as to evidence
ention that it should extend at least for the
ɔn of his life.

e use, possession, right to the income, or other
ıent of the property will be considered as
been retained by or reserved to the decedent
extent that during any such period it is to be
towards the discharge of a legal obligation
decedent, or otherwise for his pecuniary benefit.

such retention or reservation is of a part only
use, possession, income, or other enjoyment
property, then only a corresponding proportion
value of the property should be included in
ining the value of the gross estate."

Revenue Act of 1932, House Ways & Means
(1939-1 C. B., Part 2, page 457 at 490):

"The purpose of this amendment to sect
of the Revenue Act of 1926 is to clarify
respects the amendments made to that sec
joint resolution of March 3, 1931, which w
to render taxable a transfer under whi
cedent reserved the income for his life.
resolution was designed to avoid the effe
sions of the Supreme Court holding such
not taxable if irrevocable and not made in
tion of death. Certain new matter has
added, which is without retroactive effect.

"The changes are:

"(1) The insertion of the words 'o
period not ascertainable without refere
death,' is to reach, for example, a tran
decedent reserved to himself semiannua
of the income of a trust which he had
but with the provision that no part of th
come between the last semiannual paym
and his death should be paid to him or hi
where he reserves the income, not necessa
remainder of his life, but for a period in
tainment of which the date of his death w
sary element.

rs old, reserves the income for an extended
f years and dies during the term, or where he
ave the income from and after the death of
r person until his own death, and such other
predeceases him. This is a clarifying change
es not represent new matter.

) The insertion of the words 'the right to the
' in place of the words 'the income' is designed
ch a case where decedent had the right to the
, though he did not actually receive it. This is
clarifying change.

) The insertion of the words 'either alone or
junction with any person' is to reach a case
decedent had a right, with the concurrence
other person or persons, to designate those
ould possess or enjoy the property or the in-
therefrom."

ort of the Senate Committee on Finance con-
me explanation, verbatim, of the changes made
Act (1939-1 C. B., Part 2, page 496 at 532).

l Changes Act of 1949, Conference Committee
949-2 C. B., page 295 at 296).

g to the 1949 Amendments to Section 811(c),

* * Amendment No. 6 provides that prop-
transferred before June 7, 1932, shall not be

property unless the transfer was made a
3, 1931, and before June 7, 1932, and i
in his gross estate by reason of the amen
guage of the joint resolution of March 3
Stat. 1516)."

Referring to the privilege of tax-free reli
of certain retained powers or rights, accor
1949 Act:

"* * * The tax immunities provide
conference amendments also apply to a tra
after March 3, 1931, and before June 7,
reservation by the transferor of an inco
which would not render the transferre
includible in his gross estate by reason of t
tory language in the joint resolution of
1931."

The last two excerpts are quoted only to
fact, apparent from the 1949 Act itself, that
1949 Congress thought there could be a differe
pre-March 3, 1931, trusts and those created b
date and June 7, 1932.

No. 12,980

he United States Court of Appeals for the Ninth Circuit

MYRON SELZNICK, DECEASED, BANK OF AMER-
ONAL TRUST AND SAVINGS ASSOCIATION, DAVID
NICK AND CHARLES H. SACHS, EXECUTORS,
RS

v.

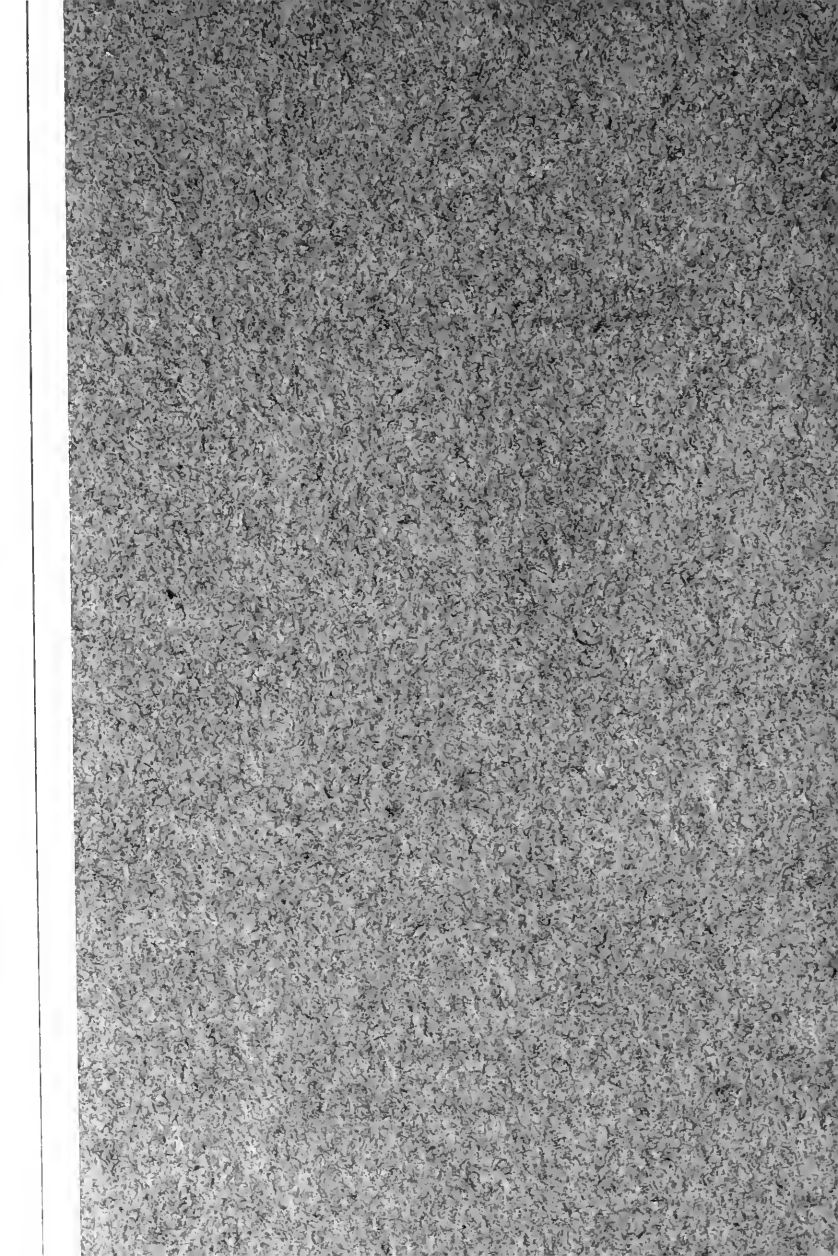
SIONER OF INTERNAL REVENUE, RESPONDENT

N FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
LEE A. JACKSON,
L. W. POST,
Special Assistants to the Attorney General.



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he assets here involved are includible in the grantor's ss estate under Section 811(c) of the Code, as ended 9
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the United States Court of Appeals for the Ninth Circuit

No. 12980

MYRON SELZNICK, DECEASED, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, DAVID SELZNICK AND CHARLES H. SACHS, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Tax Court rendered [illegible]949 (R. 2, 69-74), is unreported. The opinion [illegible]emental opinion of the Tax Court on remand, [illegible]ed November 28, 1950 (R. 121-152), are re-[illegible]15 T.C. 716.

JURISDICTION

[illegible]e involves federal estate taxes. The Commis-[illegible]otice of deficiency (R. 25-30) was mailed to [illegible]vers on or about March 27, 1947. (R. 4, 25,

for redetermination under Section 871 (a)
ternal Revenue Code. (R. 1, 3-30.) The
the Tax Court that there is a deficiency in es
$199,842.44 was entered on June 7, 1949.
The case was then brought to this Court b
for review filed July 29, 1949 (R. 3, 92-97), p
the provisions of Section 1141(a) of the Inte
nue Code, as amended by Section 36 of the A
25, 1948. On December 28, 1949, this Court
mandate vacating that decision and rema
cause to the Tax Court for further consider
suant to the stipulation of the parties. (R
After further proceedings, and on April 3,
Tax Court entered its decision pursuant t
that there is an overpayment in estate tax in t
of $12,108.22, which amount was paid after t
of the notice of deficiency. (R. 152-153.) T
now brought to this Court by petition for r
May 25, 1951 (R. 155-160), pursuant to the
of Section 1141(a) of the Internal Revenue
amended.

QUESTION PRESENTED

Whether assets transferred by the deceden
June 7, 1932, to a trust created by him on Ja
1932, should be included in his gross estate
poses of the federal estate tax under Secti
(d) or (g) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*.

STATEMENT

The Tax Court found the following facts
134):

state tax return of the decedent was filed with
tor of Internal Revenue for the Sixth District
rnia on June 22, 1945. (R. 124-125.)
nuary 29, 1932, the decedent created a trust
ne Citizens National Trust and Savings Bank
ngeles as trustee. (R. 125.)
II of the trust agreement reads as follows (R.

e Trustor agrees that as to the insurance
es delivered to the Trustee or which may here-
be delivered to it:

cause each and every policy intended to be
subject to this agreement and the trusts here-
r to be made payable to the Trustee by suffi-
designation as beneficiary thereof, or in such
manner as the parties hereto and any insurer
agree, and the Trustee assumes no responsi-
for the sufficiency or effect of any instrument
reement by which any policy shall be made
ble to it.

III of the trust agreement provides, in part
26):

ring the lifetime of the Trustor, Myron Selz-
no sale or exchange of property which may at
ime comprise the principal of the trust estate,
o change in the investments of the principal of
rust estate, shall be made by the Trustee ex-
on the written order and direction of said
tor or his duly authorized agent, ...,
said Trustor during his lifetime hereby re-
s for himself and/or his agent to be designated
time to time, the right to direct, in writing,
Trustee as to the investment of all cash prin-
in any securities and/or property whether or
ne same may be approved and permissible by

filed with the Trustee, to revoke said app
of David O. Selznick and/or Loyd Wrig
substitute other persons to act for and
David O. Selznick and/or Loyd Wright,
pacities herein in this paragraph pro
them to act.

Article VI of the trust agreement provide
(R. 126):

> * * * [The trustees] shall, after suffi
> or other securities have been deposited in
> so that the income therefrom shall be
> (until such time the Trustor agrees to
> premiums himself), also pay any and all
> on life insurance policies and/or contra
> may be transferred and/or delivered by th
> to the Trustee pursuant to the terms he

Article VII of the trust agreement reads
(R. 126-127):

> This Trust is irrevocable. The entire
> received and derived from the trust e
> available for distribution hereunder sh
> said Trustee paid monthly or in other
> installments as directed by the Trustor
> Selznick for and during his lifetime;
> Myron Selznick, however, reserves the
> direct the Trustee from time to time to c
> and add any and all income which, pursu
> terms hereof, may be payable to him, to
> cipal of the corpus of the trust estate,
> written instructions from time to tim
> manding.

Article VIII of the trust agreement read
as follows (R. 127):

the trust estate and available for distribution
nder shall go and be paid by said Trustee in
monthly installments, as follows: [There
vs various provisions for the distribution of
rust income to the decedent's widow, daugh-
arents, brothers and their children and a final
sion for termination of the trust and distribu-
f the corpus and for remainder to charity on
ilure of any of the heirs surviving.]

VIII further provides that (R. 127):

e Trustor reserves the right to change or sub-
e, from time to time, the said charitable insti-
ns, by giving notice of such change or substi-
n to the Trustee in writing.

XI provides as follows (R. 128):

withstanding the fact that this Declaration of
is irrevocable, the Trustor, for himself and
half of the beneficiaries, reserves the right to
on any court of competent jurisdiction at any
and from time to time to amend and/or con-
the same; provided, however, that no amend-
shall change the provisions of this trust which
have the effect or which is intended to or
cause the same to be construed to be or amend
e a revocable trust rather than an irrevocable

e Trustor reserves the absolute right to cancel
ıse to be cancelled, and revoke or cause to be
ed, any of the insurance policies herein re-
d to, or which may hereafter be added to this
, provided that he first obtain the written con-
f any two of the following, to wit: The Trus-
avid O. Selznick and Loyd Wright; provided
er, that upon any cancellation any cash sur-
r values received on any such policies, shall

(R. 128-129):

> Any income accrued or undistributed a
> mination of any trust or estate hereun
> belong and go to the beneficiary or benefic
> titled to the next eventual estate, in the s
> portions as the principal hereof, provid
> ever, that it is an express condition of
> herein created, which shall take precede
> any and all other provisions herein relat
> distribution of the trust estate, that the T
> authorized and empowered and may in its
> absolute discretion, although it is not obl
> to do, from the net income and/or princi
> trust estate and in such manner as to it
> equitable and just, pay a reasonable su
> defraying either in whole or in part the ex
> the last illness and of the funeral of th
> and/or any specifically named or conting
> ficiary or beneficiaries under said Trust.

The decedent transferred assets to the tru
lows:

On January 29, 1932, decedent transferr
trust assets (other than life insurance contra
ing a value on the date of decedent's death
951.83. After June 6, 1932, decedent transfer
trust, assets (other than life insurance contra
ing a value on the date of decedent's death
817.79, which amount it is stipulated and agre
event, is properly includible in decedent's gr
(and which represents $28.81 more than the a
ported in the estate tax return on account of t
(R. 129.)

Decedent also assigned to the trust, prior
1932, life insurance contracts owned by him,

date of decedent's death, were $188,275.31, of
portion allocable to premiums paid prior to
10, 1941, was $148,805.10, and the portion al-
premiums paid after that date was $39,470.21,
er sum, it is stipulated and agreed, is in any
ludible in decedent's gross estate (and which
s $62.63 more than the amount reported in the
return on account of the insurance). (R. 130.)
forth in the declaration of trust, the net in-
ie trust was to be paid to Myron Selznick. The
id various amounts to the decedent from time
set out on pages 130-132 of the record.
date of decedent's death there were $1,138.36
ncome on hand with the trustee which had
nd which had not been distributed to the de-
R. 132.)
mmissioner determined in the notice of de-
at all of the property transferred by the de-
the trust created on January 29, 1932, should
d in the gross estate of the decedent pursuant
811(c) of the Internal Revenue Code. (R.

il 1, 1949, the Tax Court entered a memoran-
on which sustained the Commissioner's inclu-
e gross estate under Section 811(c), Internal
Code, of certain property transferred by the
in trust. That memorandum opinion was
he case of *Commissioner* v. *Estate of Church,*
632. On June 3, 1949, a decision of the Tax
entered that there was a deficiency in estate
99,842.44. The taxpayers appealed to this
R. 123.)
roceedings in this Court the parties stipulated

cedent, pursuant to Section 811(c), (d) (
the Internal Revenue Code.

The Tax Court held that the property
tion should be included in the deceden
estate under Section 811(c) and based its
solely on the *Church* case (*Commissioner
of Church,* 335 U. S. 632). The Tax Cou
orandum opinion was entered herein on
1949. Since that time Section 811(c)
amended and the rule of the *Church* case
affected by the amendments. See Act of
25, 1949, Public Law 378, 81st Cong., 1st
the circumstances it seems appropriate th
cision of the Tax Court be vacated and t
be remanded to it for further proceedings

Accordingly it is hereby stipulated that
sion below should be vacated and the case
remanded to the Tax Court further c
tion in the light of the above-mentioned
ments to Section 811(c), and also subdivi
and (g).

* * * *

This Court remanded the proceedings to
Court. (R. 123.) The nature of the cause un
date is set forth therein, in part, as follows (R.

* * * on stipulation of counsel for r
parties that the decision of the Tax Court
vacated and the cause remanded to the T
for further consideration:

On Consideration Whereof, It is now
dered and adjudged by this Court that the
of the said Tax Court of the United Stat
cause be, and hereby is vacated, and that t
be, and hereby is remanded to the Tax Co
United States for further consideration in
of the amendments of October 25, 1949, t

assets here involved are includible in the de-
gross estate for purposes of the federal estate

SUMMARY OF ARGUMENT

x Court's decision is correct and can be sup-
t only by the reasoning in the opinion but upon
ounds set out in this brief.

v of the rights and powers retained by this
over the assets he placed in trust, all of those
oth non-insurance and insurance) are includ-
e gross estate under Section 811(c) or (d) of
nal Revenue Code, and the insurance is also
nder (g).

ARGUMENT

I

sets Here Involved Are Includible in the Grantor's Estate under Section 811(c) of the Code, as d

his case was first before the Tax Court it held
the property in question should be included in
or's gross estate for purposes of the federal
under Section 811(c) of the Internal Revenue
d it relied upon *Commissioner* v. *Estate of*
35 U. S. 632, in that connection. (R. 74.)
as pointed out above, Section 811(c) was
amended by the Technical Changes Act of
he rule of the *Church* case was affected by the
nts. Therefore, the parties stipulated for a
nd pursuant to the stipulation this Court re-
ne case to the Tax Court for further considera-
e light of the amendments to Section 811(c),
ubdivisions (d) and (g) of the Internal Reve-

erty in question is includible in the grantc
estate, basing its decision as to the incom
property (referred to as the non-insurance a
Section 811(c) and its decision as to the insu
sets on Section 811(g) of the Code. (R. 146,
The Tax Court did not find it necessary to co
applicability of subdivision (c) to the insura
(R. 151) or to consider subdivision (d) at all (

We submit that the result reached by the T
is entirely correct and justified by its reasoni
as by other considerations which will hereinaft
lined. This section of our brief will be con
consideration of the provisions of Section 811
the Tax Court correctly concluded are applic
respect to the non-insurance assets, and which
are applicable to the insurance assets as well.

Section 811(c)(1)(B) of the Code, as amend
Technical Changes Act, provides for the inc
property donatively transferred by the decede
he retained for his life or for any period not
able without reference to his death or for a
which does not in fact end before his death (i
session or enjoyment of, or the right to the inc
the property, or (ii) the right, either alone c
junction with any person, to designate the per
shall possess or enjoy the property or the inco
from. The Technical Changes Act further
as follows:

SEC. 7. TRANSFERS TAKING EFFECT AT DE

* * * *

(b) The amendment made by subsec
shall be applicable with respect to estat
cedents dying after February 10, 1939. T

erwise specifically provided in such section or following sentence) apply to transfers made fore, or after February 26, 1926. The provi- of section 811(c)(1)(B) of such code shall n the case of a decedent dying prior to Janu- 1950, apply to—

1) a transfer made prior to March 4, 1931; or
2) a transfer made after March 3, 1931, and or to June 7, 1932, unless the property trans- red would have been includible in the de- ent's gross estate by reason of the amendatory guage of the joint resolution of March 3, 1931 Stat. 1516).

* * * * *

nstant case the decedent died in 1944 and the question were transferred to the trust after 1931, and prior to June 7, 1932. Therefore, s to Section 811(c) turns on whether the prop- sferred would have been includible in the s gross estate by reason of the amendatory of the joint resolution of March 3, 1931, c. at. 1516. This is as follows:

solved by the Senate and House of Represent- s of the United States of America in Congress bled, That the first sentence of subdivision f section 302 of the Revenue Act of 1926 is ded to read as follows:

e) To the extent of any interest therein of the decedent has at any time made a transfer, ust or otherwise, in contemplation of or in- d to take effect in possession or enjoyment at er his death, including a transfer under which ransferor has retained for his life or any pe- not ending before his death (1) the possession joyment of, or the income from, the property) the right to designate the persons who shall

quate and full consideration in money o
worth."

At this point it seems appropriate to mal
statement with respect to the joint resolu
pointed out in *Hassett* v. *Welch,* 303 U. S. 3
was expressly designed to overcome the effect
Heiner, 281 U. S. 238, and other cases fo
(*Burnet* v. *Northern Trust Co.,* 283 U. S. 782;
v. *Burnet,* 283 U. S. 783; *McCormick* v. *B*
U. S. 784) which held that the retention of t
for life of the grantor of a trust was not alo
to support taxation of the transfer as one in
take effect in possession or enjoyment at or
grantor's death. The joint resolution was re
substance by Section 803(a) of the Revenue A
c. 209, 47 Stat. 169, with but "slight verbal dif
See *Hassett* v. *Welch, supra,* p. 307. The joi
tion and Section 803(a) of the Act of 1932
retroactively applicable to transfers made pri
enactment, and they applied only prospe
transfers with reservation of life income ma
quent to the dates of their adoption (March 3,
June 6, 1932), respectively. *Hassett* v. *Wel*
Helvering v. *Bullard,* 303 U. S. 297; *Comm*
Clise, 122 F. 2d 998 (C. A. 9th), certiorari d
U. S. 821. The provisions of the joint res
amended by 803(a) were carried forward in
ternal Revenue Code (Section 811(c)) and
above they have also been continued by the
Changes Act. However, as also pointed out
Technical Changes Act does recognize a disti
tween the joint resolution and 803(a) and p
that connection that a transfer made after

; on this distinction, the taxpayers say (Br.
ase is without the scope of the joint resolution
it would be covered by the 1932 amendments.
nk taxpayers are relying on a shadow that is
ubstance and the Tax Court correctly so held.
46.)

connection the Tax Court referred (R. 138)
owing pertinent provisions of the trust:

* * The entire net income received and de-
from the trust estate and available for distri-
n hereunder shall be by said Trustee paid
nly or in other convenient installments as
ted by the Trustor to Myron Selznick for and
g his lifetime; the said Myron Selznick, how-
reserves the right to direct the Trustee from
o time to credit, keep and add any and all in-
which, pursuant to the terms hereof, may be
ble to him to the principal of the corpus of the
estate, by giving written instructions from
o time so demanding.

* * * * *

y income accrued or undistributed at the ter-
ion of any trust or estate hereunder shall be
and go to the beneficiary or beneficiaries en-
to the next eventual estate, in the same pro-
ons as the principal hereof, * * *

Tax Court noted (R. 138) that on the date of
ent's death there were $1,138.36 of accrued
me which the trustee had not distributed to
nt. The Tax Court then carefully considered
46) all of the arguments in the case and con-
at it falls within the scope of the amendatory
of the joint resolution. In so concluding the
aptly said (R. 145-146):

until his power to command the payment
income was ended by his death. He could
this income at any time and in any manne
sired merely by so requesting the trustee
the decedent enjoyed the trust income du
life to the extent that he desired. No othe
had any claim upon that income until t
dent's death and it was then determined h
income, if any, the decedent had not called
trustee to pay over to him. The decedent
the right to the trust income until the tim
death. The income to which he had a r
which at his death he had not reduced to p
was no less "retained" by him.

In our opinion, and in the language
Resolution of 1931, the decedent made a tra
which he "retained for his life * * * th
from, the property * * *." We hold, th
that the non-insurance assets transferred
decedent prior to June 7, 1932, to a trust cr
him on January 29, 1932, are includible in
estate under section 811(c) of the Code.

We submit that the Tax Court's decision is
correct. Here the decedent retained the incom
in every practical and realistic sense, and whate
be the effect of the "slight verbal differenc
Hassett v. *Welch, supra,* p. 307) between the jo
lution and the 1932 amendment, they do not
taxpayers here and this case falls within the le
the spirit of the joint resolution.

The taxpayers refer (Br. 10-11) to the prov
the trust that we have quoted above, and reiter
argument, rejected by the Tax Court, that beca
was some $1,100 of income accrued at the date
dent's death and this went to the succeeding

therein pointed out, the trust instrument states words that the income shall be paid to the decer and during his lifetime" (R. 138), and he had e command over all of the trust income until he That is enough to support the tax.

axpayers refer (Br. 12-14) to the Committee on the 1932 amendment (H. Rep. No. 708, 72d st Sess., pp. 46-47 (1939-1 Cum. Bull. (Part 2) 491); S. Rep. No. 665, 72d Cong., 1st Sess., pp. 939-1 Cum. Bull. (Part 2) 496, 532)), which part as follows:

he purpose of this amendment to section 302(c) he revenue act of 1926 is to clarify in certain ects the amendments made to that section by joint resolution of March 3, 1931, which were pted to render taxable a transfer under which decedent reserved the income for his life. The t resolution was designed to avoid the effect of sions of the Supreme Court holding such a nsfer not taxable if irrevocable and not made in emplation of death. Certain new matter has been added, which is without retroactive effect. he changes are:

1) The insertion of the words "or for any od not ascertainable without reference to his h," is to reach, for example, a transfer where edent reserved to himself semiannual payments ne income of a trust which he had established, with the provision that no part of the trust ine between the last semiannual payment to him his death should be paid to him or his estate, or re he reserves the income, not necessarily for remainder of his life, but for a period in the

cidentally, it should be noted (R. 63, 128-129) that under

necessary element.

(2) The insertion of the words "or for riod which does not in fact end before his which is to reach, for example, a transfe decedent, 70 years old, reserves the incom extended term of years and dies during t or where he is to have the income from and a death of another person until his own dea such other person predeceases him. This is fying change and does not represent new m

(3) The insertion of the words "the rig income" in place of the words "the inc designed to reach a case where decedent right to the income, though he did not act ceive it. This is also a clarifying change.

Taxpayers say that these reports illustrate of situation, not covered by the joint resolution, 1932 amendment was intended to cure. But a that to be so, it does not help the taxpayers he payers rely upon the example in paragraph respect to reservation of semiannual paymen come, but with the provision that no part of th between the last semiannual payment to the and his death should be paid to him or his esta submit that such reliance is misplaced. Even a that a situation of that kind would not be covere joint resolution, still it is plainly distinguisha the instant situation because here the grantor trol of all the income until he died.

The taxpayers also rely (Br. 13-14) upon plicable Regulations (Treasury Regulations tion 81.18, as amended (Appendix, *infra*)) wh tain a similar reference with respect to a reser quarterly payments of trust income where no income between the last quarterly payment an

income until he died.

xpayers say (Br. 14) that the decedent's power
payments of income is without significance
we submit it is highly significant and the Tax
roperly took it into consideration in deciding
in favor of the Commissioner.

e see nothing in the practical construction put
provisions of the trust in the instant case that
d to our views. Taxpayers point out (Br. 15)
periods between income payments to the
during his lifetime varied somewhat, and this
trengthens the view that he had complete con-
the situation and could have the income
and if he wanted it. That is what he intended
is what he got.

cases such as *Hassett* v. *Welch, supra,* the tax-
ay (Br. 7-8, 16-17) that this is a doubtful case
doubt should be resolved in their favor. But
may be the scope of the rule as to resolution
s (see *White* v. *United States,* 305 U. S. 281,
submit there is no substantial doubt in this
in any event the question of statutory con-
that is presented should be decided. Cf. *Com-*
v. *Nathan's Estate,* 159 F. 2d 546 (C. A. 7th),
i denied, 334 U. S. 843. Doubts disappear
question is carefully examined.

light of the foregoing considerations we sub-
the Tax Court correctly held that the non-
e assets should be included in the grantor's
ate for purposes of the federal estate tax under
11(c), as amended.

ains to add a word with respect to the insur-
ets which we think are also includible under

and that aspect of the case will be discussed
section of this brief. It is true that the divi
unmatured life insurance policies are not ge
sufficient significance to merit treating them
for purposes of taxation; they are rather tre
return of premiums paid. See I Paul, Feder
and Gift Taxation (1942), Sec. 10.21, p. 543.
in view of the power of the instant decedent, w
be more fully discussed hereafter with respe
divisions (d) and (g) of Section 811 of the
surrender the policies for cash and to control t
ment of the proceeds so that he could in effect
tained the income from such investments (R.
128, 150-151), we think that it would not be
far to hold that the insurance assets, as well as
insurance assets, are includible under Sectio
The Commissioner took that position in the T
and indeed the taxpayers appear to recognize
that the insurance is involved under subdivi
The regulations are in harmony with that vi
Treasury Regulations 105, Section 81.25.
Paul, Federal Estate and Gift Taxation (194
Section 10.39, pp. 374-376.

In view of the foregoing we submit that
property here involved should be included in
estate under Section 811(c); and if this Cou
with us as to this it will be unnecessary for it to
the further aspects of the case which will be
in the following sections of this brief.

II

Subdivision (d) Also Applies

As stated above, in the Tax Court proceed

out in view of its disposition of the case the
rt did not find it necessary to pass on the point.
)

the Commissioner is of course free to rely upon
ion (d) here (*Helvering* v. *Gowran,* 302 U. S.
247), and indeed the taxpayers so concede (Br.
ill outline briefly our views with regard thereto.

n 811(d)(2) of the Code provides for inclusion
erty donatively transferred by the decedent
ne enjoyment was subject at the date of his
any change through the exercise of a power,
the decedent alone or in conjunction with any
o alter, amend, or revoke.

nstant trust contains the following provisions
28):

otwithstanding the fact that this Declaration
Trust is irrevocable, the Trustor, for himself
on behalf of the beneficiaries, reserves the right
etition any court of competent jurisdiction at
time and from time to time to amend and/or
true the same; provided, however, that no
ndment shall change the provisions of this trust
h shall have the effect or which is intended to
hall cause the same to be construed to be or
nd it to be a revocable trust rather than an ir-
cable one.

he Trustor reserves the absolute right to concel
ause to be cancelled, and revoke or cause to be
ked, any of the insurance policies herein re-
ed to, or which may hereafter be added to this
st, provided that he first obtain the written con-
of any two of the following, to-wit: The Trus-
David O. Selznick and Loyd Wright; provided
her, that upon any cancellation any cash sur-

graph above, although the second paragraph
particularly with insurance policies, should
borne in mind in connection with (d).

We submit that under the provisions of the t
decedent had a power to alter or amend whic
cient to justify taxation under subdivision (d)

It is settled that the statute applies to a ca
the grantor of a trust reserved the power to
shares of beneficial interest therein, even th
could not direct payment to himself (*Commis
Estate of Holmes,* 326 U. S. 480; *Porter* v.
sioner, 288 U. S. 436; *Commissioner* v. *Newb
tate,* 158 F. 2d 694 (C. A. 2d); *Mollenberg's
Commissioner,* 173 F. 2d 698 (C. A. 2d); *M
Maloney,* 121 F. 2d 257 (C. A. 3d), certiorar
314 U.S. 636; *Thorp's Estate* v. *Commissione
2d 966 (C. A. 3d), certiorari denied, 333 U. S
re Tyler's Estate, 109 F. 2d 421 (C. A. 3d); *Gug
v. *Helvering,* 117 F. 2d 469 (C. A. 2d), certiorar
314 U. S. 621; I Paul, Federal Estate and Gift
(1942) and 1946 Supplement, Section 7.09)
makes no difference whether the power was ex
by the grantor individually or as trustee.
sioner v. *Newbold's Estate, supra; Jennings*
161 F. 2d 74 (C. A. 2d); *Estate of Nettleton* v.
sioner, 4 T. C. 987.

See also *Commonwealth Trust Co. of Pitts
Driscoll,* 50 F. Supp. 949 (Pa.), affirmed, 137 F
(C. A. 3d), certiorari denied, 321 U. S. 764.

Hence it is clear that (d) applies to a case w
grantor reserved the power to change the schem
joyment of the trust property in a substantial

We submit that this is such a case. Here th

ent should make it revocable. It seems clear
power would have justified any amendments
the settlor short of actually revoking the trust
atement, Trusts (1935), Section 37) and there-
property is taxable under Section 811(d).

, the statute applies even where the power to
only exercisable in conjunction with persons
dverse interests (*Helvering* v. *City Bank Co.*,
85; Treasury Regulations 105, Section 81.20
ix, *infra*)), and such a power would appear
less significance than the one in the instant
re the decedent could represent both himself
eneficiaries.

xpayers contend (Br. 19-23) that the power
on amounted to no more than what the law
ply in its absence and therefore is not enough
t taxation. But we think otherwise; and we
derstand that the law would imply any such
retained by the decedent here. This power
ot only to procedure but also to substance, and
s' insistence to the contrary loses sight of the
nd scope of the language by which the power
ved. As noted above, here the decedent was
tion to represent both himself and all of the
eficiaries before any court of competent juris-
t any time in petitioning for an amendment
st. If he had not reserved this power, he could
represented other beneficiaries having adverse
Schram v. *Poole,* 97 F. 2d 566 (C. A. 9th);
f Los Angeles v. *Winans,* 13 Cal. App. 234; I
n, Trust Administration and Taxation (1945),
550-558, pp. 608-627.

guments of taxpayers are plainly unsound and

in conjunction with all the other beneficiari
trust and of course this added nothing to wha
would have conferred in the absence of the spe
ervation. Such a situation is recognized by t
cable Regulations (Treasury Regulations 10
81.20) to be nontaxable. And in that conne
regulation provides:

> The provisions of this section do not a
> transfer if the power may be exercised
> the consent of all parties having an intere
> or contingent, in the transferred proper
> the power adds nothing to the rights of t
> as conferred by the applicable local law.

Here we are concerned with a different sort
which in effect gave the settlor control over the
of the beneficiaries.

The taxpayers say (Br. 24-25) that subdiv
has to do with persons, not courts, and th
power is without the scope of the statute b
could only be exercised by court petition. Bu
gument is plainly unsound. It is clear that
does not depend upon the capacity in which th
held the power and as we have pointed out
power reserved by the grantor as trustee is w
scope of the statute. And of course a power
is always subject to the control of a court
In this connection see *Stix* v. *Commissioner,*
562 (C. A. 2d), where the court said (p. 563):
language, however strong, will entirely rem
power held in trust from the reach of a court of

Taxpayers cite cases (Br. 26-27) such as
sioner v. *Irving Trust Co.,* 147 F. 2d 946 (C
but they have little, if any bearing on the ins

d case; but whatever may be thought as to the
ss of the decision in the *Irving Trust Co.* case
ly does not hold or indicate that taxability
ase such as we have here can be avoided merely
ng that the exercise of the power in question
subject to scrutiny by a court of equity.

ver says (Br. 27) that in the instant case there
ernal standard with respect to exercise of the
Assuming that to be so, it would not weaken our
here and it does not at all detract from the
f the power. Here the grantor reserved a broad
rehensive power to alter or amend and that is
o support taxation under subdivision (d) de-
fact that the exercise of the power would re-
plication to a court of competent jurisdiction.
w of the foregoing we submit that all of the
here involved (both non-insurance and insur-
ts) is includible under Section 811(d) as well
; and if this Court agrees with us as to either
subdivisions, it will be unnecessary for it to
811(g) which relates solely to insurance and
scussed in the next section of this brief.

III

ent, the Insurance Proceeds Are Includible under Section 811(g)

omit that whatever may be thought as to the
ss of our position with respect to Section 811
(d), still, the insurance assets are includible
ction 811(g) of the Code, as amended by
04 of the Revenue Act of 1942 and the Tax
rectly so held. (R. 146-151.)

811(g), as so amended, relates to amounts

receivable by all other beneficiaries where the
was purchased with premiums paid directly
rectly by the decedent or with respect to
decedent possessed at his death any of the
of ownership, exercisable either alone or in co
with any other person. The law as so amende
cable to estates of decedents dying after O
1942; but in determining the proportion of
miums paid by the decedent the amount so p
before January 10, 1941, shall be excluded if
after such date the decedent possessed an in
ownership in the policy.[2]

The instant decedent died in 1944 and so
going provisions are applicable. Under the
the statute, outlined above, the insurance proc
involved are includible if the decedent pos
his death, or at any time after January 10,
of the incidents of ownership, exercisable eit
or in conjunction with any other person. W
understand that there is any dispute as to t

The point in dispute is whether the deceden
such incidents of ownership. We submit tha
them at all times after January 10, 1941,
he died.

The second paragraph of Article XI of
instrument (which we referred to above in c
with (d)) contains the following language (R
149):

> The Trustor reserves the absolute right
> or cause to be cancelled, and revoke or ca
> revoked, any of the insurance policies

ed to, or which may hereafter be added to this
st, provided that he first obtain the written
ent of any two of the following, to wit: The
stee, David O. Selznick and Loyd Wright;
ided further, that upon any cancellation any
surrender values received on any such policies,
remain in and/or be added to the corpus of this
st.

ry Regulations 105, Section 81.27, as amended
ix, *infra*), undertakes to define the term "inci-
wnership," and provides that it is not confined
ship in the technical legal sense. Section 81.27
ides as follows:

cidents of ownership in the policy include, for
mple, the right of the insured or his estate to
conomic benefits, the power to change the
ficiary, to surrender or cancel the policy, to
n it, to revoke an assignment, to pledge it for
n, or to obtain from the insurer a loan against
urrender value of the policy, etc. The insured
esses an incident of ownership if his death
cessary to terminate his interest in the insur-
as, for example, if the proceeds would become
ble to his estate, or payable as he might direct,
ld the beneficiary predecease him.

Paul, Federal Estate and Gift Taxation (1946
Section 10.37, pp. 368-372; H. Rep. No. 2333,
g., 2d Sess., p. 163 (1942-2 Cum. Bull. 372, 491);
No. 1631, 77th Cong., 2d Sess., p. 235 (1942-2
ll. 504, 677).

the provisions of the trust, quoted above, the
had the right to cancel and revoke any of the
vith the consent of two other persons, provided,
that any cash surrender values received on

151):

The insurance policies were made payal
trust and the decedent reserved in the
power to cancel the insurance policies i
obtained the written consent of any tw
following: The Trustee, David O. Selznick
Wright. But the decedent reserved t
to revoke the appointment of the last tw
persons above and to "substitute other
It is true, as the petitioners contend,
proceeds of the cancelled policies would n
diately accrue to the decedent. But those
would be invested by the trustee and th
therefrom would go to decedent for his li
the trust agreement. Further, the dece
served, in the trust, the right to direct th
as to the investment of the trust corpus
of which the canceled policies would beco
the investment directed by the decedent
be "approved and permissible by law fo
ment of trust funds under the laws of t
of California."

It is apparent that the decedent coul
the policies and the proceeds representing
surrender value would become a part of
corpus. Although the proceeds of the
policies would not inure to the decedent'
the income therefrom (since he reserved
income for life) would go to the decede
such investment of the proceeds as the
chose to direct. The right to receive th
from such property is an "incident of ow
within the meaning of the statute.

In our opinion, the proceeds of the i
policies allocable to premiums paid prior
ary 10, 1941, are includible in the deceden
estate under the provisions of section 8
the Internal Revenue Code, and we so ho

could amend and thus change the beneficiaries
rust and in the circumstances this power
to an incident of ownership. *Chase Nat.*
United States, 278 U. S. 327; *Helvering* v.
33 F. 2d 215 (C. A. 2d); *Estate of Welliver* v.
oner, 8 T. C. 165.

ning considered, we think it plain that the
nad incidents of ownership sufficient to justify
nder (g), and the authorities amply support
Chase Nat. Bank v. *United States, supra;*
. *Smyth,* 87 F. Supp. 983 (N.D. Cal.), affirmed,
220 (C. A. 9th); *Commissioner* v. *Treganowan,*
288 (C. A. 2d), certiorari denied, *sub nom.*
Strauss v. *Commissioner,* 340 U. S. 853; *Hock*
ssioner, 152 F. 2d 574 (C. A. 8th); *Liebmann*
t, 148 F. 2d 247 (C. A. 1st); *Schongalla* v.
49 F. 2d 687 (C. A. 2d), certiorari denied,
736; *Seward's Estate* v. *Commissioner,* 164
(C. A. 4th).

ght of the foregoing considerations we submit
ax Court did not err in holding the insurance
ludible under Section 811(g).

payers say (Br. 33) that by the assignments
stee the decedent completely divested himself
ership and rights in the contracts, retaining
t of ownership. But that contention is out
y with the reservations in the trust instru-
ded to above, which the decedent unquestion-
. Indeed, the taxpayers admit (Br. 34) that
ent retained under the trust the right with
of two other persons to cancel the policies
event the surrender values were to remain
st corpus. However, they contend (Br. 34)

we submit that such contention is plainly
The authorities cited by taxpayers are not at
with our position here and none of them hold
intimates that rights such as retained by this
do not constitute an incident of ownership
rights were explicitly reserved in the trust ins
they are clearly enough to support taxation
(g) and the Tax Court properly so held.

In the light of these considerations we su
all of the assets here involved are includib
gross estate under Section 811(c) or (d)
the insurance is also taxable under (g).
Court's decision is correct and can be supp
only by the Tax Court's reasoning but upo
grounds we have set out in this brief.

CONCLUSION

The decision of the Tax Court should be

Respectfully submitted.

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OCTOBER, 1951.

Revenue Code:

. 811. GROSS ESTATE

value of the gross estate of the decedent be determined by including the value at the of his death of all property, real or personal, ble or intangible, wherever situated, except property situated outside of the United s—

* * * * *

[as amended by Sec. 7(a) of the Technical ges Act of 1949 (Act of October 25, 1949), , 63 Stat. 891.] *Transfers in Contemplation Taking Effect at, Death.*—

1) *General Rule.*—To the extent of any intertherein of which the decedent has at any time le a transfer (except in case of a bona fide for an adequate and full consideration in ney or money's worth), by trust or other- e—

* * * * *

(B) under which he has retained for his fe or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death i) the possession or enjoyment of, or the right to the income from, the property, or (ii) ne right, either alone or in conjunction with ny person, to designate the persons who shall ossess or enjoy the property or the income nerefrom; * * *

* * * * *

Revocable Transfers—

* * * * *

2) *Transfers on or Prior to June 22, 1936.*

thereof was subject at the date of his
any change through the exercise of
either by the decedent alone or in co
with any person, to alter, amend, or
where the decedent relinquished any s
in contemplation of his death, except
a bona fide sale for an adequate and f
eration in money or money's worth.

* * * *

(g) [as amended by Section 404(a) of
enue Act of 1942, c. 619, 56 Stat. 798.]
of Life Insurance.—

* * * *

(2) *Receivable by Other Beneficiarie*
extent of the amount receivable by
beneficiaries as insurance under poli
the life of the decedent (A) purchased
miums, or other consideration, paid d
indirectly by the decedent, in propo
the amount so paid by the decedent be
total premiums paid for the insuranc
with respect to which the decedent po
his death any of the incidents of owners
cisable either alone or in conjunction
other person. For the purposes of c
of this paragraph, if the decedent tra
by assignment or otherwise, a policy
ance, the amount paid directly or ind
the decedent shall be reduced by an amo
bears the same ratio to the amount pai
or indirectly by the decedent as the con
in money or money's worth received by
dent for the transfer bears to the va
policy at the time of the transfer. Fo
poses of clause (B) of this paragraph
"incident of ownership" does not
reversionary interest.

al Changes Act of 1949 (Act of October 25,
720, 63 Stat. 891:

. 7. TRANSFERS TAKING EFFECT AT DEATH.

* * * * *

The amendment made by subsection (a)
be applicable with respect to estates of dece-
dying after February 10, 1939. The provi-
of section 811(c) of the Internal Revenue
as amended by subsection (a), shall (except
erwise specifically provided in such section
the following sentence) apply to transfers
on, before, or after February 26, 1926. The
ions of section 811(c)(1)(B) of such code
not, in the case of a decedent dying prior
nuary 1, 1950, apply to—

1) a transfer made prior to March 4, 1931; or

2) a transfer made after March 3, 1931, and
r to June 7, 1932, unless the property trans-
ed would have been includible in the dece-
t's gross estate by reason of the amendatory
guage of the joint resolution of March 3, 1931
Stat. 1516).

* * * * *

Act of 1942, c. 619, 56 Stat. 798:

. 404. PROCEEDS OF LIFE INSURANCE.

* * * * *

Decedents to Which Amendments Appli-
—The amendments made by subsection (a)
e applicable only to estates of decedents dying
he date of the enactment of this Act [October
42]; but in determining the proportion of
emiums or other consideration paid directly
directly by the decedent (but not the total
ums paid) the amount so paid by the dece-
n or before January 10, 1941, shall be ex-

Internal Revenue Code:

SEC. 81.18 [as amended by T.D. 5834, 1
Rev. Bull. 6, 14.] *Transfers with Pos*
Enjoyment Retained.—(a) *General rule*
in the case of a bona fide sale for an
and full consideration in money or mone
section 811(c)(1)(B) requires the inclus
gross estate of the value of all property tr
by the decedent, whether in trust or oth
the decedent retained or reserved the us
sion, right to the income, or other enjoym
transferred property (1) for his life; c
any period not ascertainable without re
his death; or (3) for such a period as t
his intention that it should extend at
the duration of his life and his death occ
the expiration of such period. Except as
in paragraph (b) of this section such p
includible without regard to the date
transfer was made, whether before or
enactment of the Revenue Act of 1916.

A reservation for a "period not asc
without reference to his death" may be i
by a reservation of the right to receive, in
payments, the income of the transferred
where none of the income between the last
payment and the decedent's death was
ceived by him or his estate. This expre
includes a reservation of the right to r
income from transferred property after
of another person who in fact survived
dent; but in such a case the amount to b
in the gross estate under this section
include the value of the outstanding inc
est in such other person. However, if s
person predeceased the decedent, the r
may be considered to be for the deceden
for such a priod as to evidence his inte

nent of the property will be considered as
been retained by or reserved to the decedent
extent that during any such period it is to
lied toward the discharge of a legal obliga-
the decedent, or otherwise for his pecuniary

uch retention or reservation is of a part only
use, possession, income, or other enjoyment
property, then only a corresponding propor-
the value of the property should be included
ermining the value of the gross estate.
e section 81.15.)

Estates of decedents dying before January 1,
-In the case of a decedent who died before
ry 1, 1950, property shall not be included
gross estate under this section unless trans-
—

1) after March 3, 1931, and before June 7,
2, and the retention or reservation by the
edent was (A) for his life or (B) for such
eriod as to evidence his intention that it
uld extend at least for the duration of his
and his death occurs before the expiration
uch period; or
2) on or after June 7, 1932.

. 81.19 [as amended by T. D. 5834, *supra,*
Transfers with Right Retained to Desig-
Who Shall Possess or Enjoy—(a) *General*
-Except in the case of a bona fide sale for an
ate and full consideration in money or
's worth, section 811(c)(1)(B) requires the
ion in the gross estate of the value of all prop-
ransferred by the decedent, whether in trust
herwise, if there is retained by or reserved
n (1) for his life, or (2) for any period not
ainable without reference to his death, or
or such a period as to evidence his intention

tion with any other person or persons to
the person or persons who shall posses
the transferred property or the income
Except as provided in (b) of this sec
property is includible without regard t
when the transfer was made, whether
after the enactment of the Revenue Ac

The rights of designation described
811(c)(1)(B) include a reserved powe
nate the person or persons who shall,
decedent's life or during any lesser
scribed in such section, receive the inc
the transferred property or who shall, d
such period, possess or enjoy non-in
ducing property. Such rights of desig
not, however, include powers over the t
property itself not affecting the enjoym
income during the decedent's life. (See
section 81.20.)

If the retention or reservation of the
scribed pertains to a part only of the t
property, or to a part only of the income
then only a corresponding proportion of
of the transferred property is includibl
mining the value of the gross estate.

The right to so designate will be treated
been retained or reserved if at the ti
transfer there was an understanding,
pressed or implied, that such right wou
created or conferred.

(See section 81.15.)

(b) *Estates of decedents dying before*
1950.—In the case of a decedent who d
January 1, 1950, property shall not be i
the gross estate under this section unl
ferred—

(1) after March 3, 1931, and befo
1932, and the right of designation wa

expiration of such period; or
2) on or after June 7, 1932.

. 81.20. *Transfers with Power to Change the ment.*—(a) *Transfers included.*—Subsection f section 811 embraces a transfer by trust herwise (if not amounting to a bona fide for an adequate and full consideration in or money's worth) when at the time of ent's death the enjoyment of the transferred rty, or some part thereof or interest therein, subject to any change through a power sable either by the decedent alone, or by n conjunction with some other person or ns, to alter, or amend, or revoke, or terminate. section 81.15.)

addition to subdivision (d)(1) of the Reve- ct of 1926, by section 805 of the Revenue Act 6, of the phrase to the effect that it is not ma- in what capacity the power was subject to se by the decedent or by the other person or ns in conjunction with the decedent (which e is also embodied in subsection (d)(1) of n 811 of the Internal Revenue Code), is con- d merely declaratory of the meaning of the vision prior to the addition of the phrase.

second phrase added to this subdivision of evenue Act of 1926 by amendment in 1936 mbodied in section 811(d) (1) of the Internal ue Code), namely, "without regard to when m what source the decedent acquired such ," is not considered declaratory of the mean- the subdivision prior to the amendment in in which no one of the powers enumerated subdivision was reserved at the time of the g of the transfer, but one or more thereof conferred subsequent thereto (whatever the from which conferred) without any under-

Revenue Act of 1936 (which is also en
subsection (d)(1) of section 811 of the
Revenue Code) consists of the additi
words "or terminate" following the v
alter, amend, revoke." Such addition is
but declaratory of the meaning of the s
prior to the amendment. A power to ter
pable of being so exercised as to revest
cedent the ownership of the transferred
or an interest therein, or as otherwise t
his benefit or the benefit of his estate,
extent, the equivalent of a power to "rev
when otherwise so exercisable as to effec
in the enjoyment, is the equivalent of a
"alter."

(b) *Taxability.*—The property or an
therein transferred as described in subs
shall be included in the gross estate if
within any one of the following paragra

(1) If the transfer was made prior to
ment of the Revenue Act of 1924 (4:01
ern standard time, June 2, 1924), and
was reserved at the time of the transfe
exercisable by the decedent alone or in c
with a person or persons having no subs
verse interest or interests in the transfe
erty, or if exercisable in conjunction wit
having a substantial adverse interest or
eral persons some or all of whom held s
verse interest, then to the extent of any
interests held by a person or persons no
to join in the exercise of the power and
tent of any adverse interest which wa
stantial.

(2) If the transfer was made after
ment of the Revenue Act of 1924 (4:01
ern standard time, June 2, 1924) and
amendment of the subdivision by the Re
of 1936 became effective (June 23, 1936

; a substantial adverse interest or interests
transferred property, or in conjunction with
is one or more of whom had and one or more
om had not such an adverse interest.

If the transfer was made after June 22,
the date of the enactment of the Revenue
1936), and the power was either reserved
time of the transfer or later created or con-
, without regard to the source from which
wer was acquired, and whether exercisable
decedent alone or in conjunction with a per-
persons either having or not having a sub-
al adverse interest or interests in the trans-
property, or in conjunction with persons
more of whom had and one or more of whom
ot such an adverse interest.

used in this and in the next succeeding sec-
he expression "reserved at the time of the
er" refers to a power to which the transfer
ubject when made, whether the power arose
plication of law or by the express terms of
strument of transfer, and which continued
date of decedent's death (see the paragraph
following as to the conditions under which
wer will be considered as existent at dece-
death) to be exercisable by decedent alone
him in conjunction with some other person
rsons, and includes any understanding, ex-
d or implied, had in connection with the mak-
the transfer that the power should later be
d or conferred.

power to alter, amend, revoke, or terminate
e considered to have existed on the date of
ecedent's death, though the exercise of the
was subject to a precedent giving of notice,
ough the alteration, amendment, revocation,
mination would take effect only on the expira-
f a stated period after the exercise of the

which had not arrived, or the happening
ticular event which had not occurred, at
death. In determining the value of the
tate in such cases the full value of the
transferred subject to the power shou
counted for the period required to elaps
the date of decedent's death and the
which the alteration, amendment, revocat
mination could take effect.

(See section 81.10(i)(3).)

The provisions of this section do not
transfer if the power may be exercised
the consent of all parties having an inter
or contingent, in the transferred prope
the power adds nothing to the rights of t
as conferred by the applicable local law.

SEC. 81.27 [as amended by T. D. 5239,
Bull. 1081, 1092.] *Insurance Receivable
Beneficiaries.*—(a) *In case of decedent d
October 21, 1942.*—The regulations pres
der this subsection (except as otherwise
herein or in subsection (b) of this sectio
plicable only in the case of decedents wh
ter October 21, 1942, the date of the ena
the Revenue Act of 1942. In such cases, t
of the aggregate proceeds of all insura
life of the decedent not receivable by
benefit of his state must also be inclu
gross estate, as follows:

(1) Such insurance (not includible
of this subsection) purchased with
or other consideration, paid directly or
by the decedent, in the proportion
amount so paid by the decedent be
total premiums paid for the insuranc

(2) Such insurance with respect to
decedent possessed at his death any o
dents of ownership, exercisable either

ining the proportion of the premiums or
onsideration paid directly or indirectly by
edent (but not the total premiums paid)
ount so paid by the decedent on or before
y 10, 1941, shall be excluded if at no time
ich date the decedent possessed an incident
ership in the policy. For the purpose of
ceding sentence a reversionary interest is
dent of ownership. For a description of
d other incidents of ownership, see the fol-
paragraph and subsection (b) of this sec-

he purposes of this section, the term "inci-
f ownership" is not confined to ownership
echnical legal sense. For example, a power
ge the beneficiary reserved to a corporation
ch the decedent is sole stockholder is an
t of ownership in the decedent. For the
es of this subsection, the term "incidents
ership" includes the incidents of ownership
ed in subsection (b) (except as provided in
t sentence) and, in addition, includes inci-
of ownership possessed by the decedent as
er of the community where the insurance
is properly held as community property by
edent and spouse. Section 811(a)(2), as
by the Revenue Act of 1942, expressly pro-
hat for the purposes of section 811(g)(2)
see (2) of this subsection), but not for the
es of section 811(g)(2)(A) (see (1) of this
ion), the term "incidents of ownership"
t include a reversionary interest. However,
gnment of an insurance policy by a decedent
sing other incidents of ownership therein un-
ich he reserves a reversionary interest may
in the proceeds of the policy being includible
gross estate under section 811(c). See sec-
.25.

for example, the right of the insured or
to its economic benefits, the power to c
beneficiary, to surrender or cancel the
assign it, to revoke an assignment, to pl
a loan, or to obtain from the insurer a lo
the surrender value of the policy, etc.
sured possesses an incident of owners
death is necessary to terminate his inte
insurance, as, for example, if the proce
become payable to his estate, or payable a
direct, should the beneficiary predecease

* * * *

IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

OF MYRON SELZNICK, Deceased, BANK OF AMERATIONAL TRUST AND SAVINGS ASSOCIATION, DAVID LZNICK and CHARLES H. SACHS, Executors,

Petitioners,

vs.

SIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONERS.

WALTER L. NOSSAMAN,
JOSEPH D. BRADY,
433 South Spring Street,
Los Angeles 13, California,
Attorneys for Petitioners.

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IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

F MYRON SELZNICK, Deceased, BANK OF AMERTIONAL TRUST AND SAVINGS ASSOCIATION, DAVID ZNICK and CHARLES H. SACHS, Executors,

Petitioners,

vs.

IONER OF INTERNAL REVENUE,

Respondent.

EPLY BRIEF FOR PETITIONERS.

---

dent contends:

at as to non-insurance assets the case is within 11(c), I. R. C., because of income allegedly re- or his life or any period not ending before his Joint Resolution of March 3, 1931, quoted Pet. App. p. 1).

at as to insurance assets the same rule applies of the provision for cancellation of the policies ng the cash surrender values to corpus [Ex. 1-A, Tr. 62].

4. That as to the insurance assets the case Section 811(g) because of "incidents of owne legedly retained.

To reply point by point to respondent's content require an unnecessary and unwelcome repetiti argument in chief. We shall limit to salient discussion which follows:

Points 1 and 2. Section 811(c). It may parties to *Hassett v. Welch* agreed and the (p. 307 of 303 U. S.), that the 1932 amendment Br., App. p. 1) "reenacted the substance of Resolution with but slight verbal differences." Court was not called on in that case to dete scope or effect of those "slight verbal differenc question was whether the 1931 and 1932 legisl retroactive. The result and the reasoning by wh reached would have been the same had the 193 ment not been enacted. Indeed (p. 313 of 30 the Court notes the Treasury's inconsistency i the 1932 amendment as retroactive, while trea rectly, the Court thinks—the 1931 Joint Res non-retroactive.

We suggest that in the present case the g is exhibiting a little of the same reluctance to ing the 1932 amendment as effecting a change that it exhibited some fourteen years ago in *Welch.* That this amendment covered new gr it closed what both the Treasury and Congres was a "loophole" in the law, is shown by the c our opening brief (pp. 12-13) and the Append

3, page 7 of the Appendix to our opening brief
ed to the pre-March 8, 1951 version of Reg. 105,
1.18.[1] It will be a convenience to the Court to
relevant part of the pertinent regulation as it
ıe time of Selznick's death in 1944.

tion 81.18. Transfers with possession or en-
ent retained. Except in the case of a bona fide
for an adequate and full consideration in money
oney's worth, the gross estate embraces (section
c)) all property transferred by the decedent,
her in trust or otherwise, if he retained or re-
d the use, possession, right to the income, or other
yment of the transferred property, and if the
fer was made—

(1) At any time after 10:30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1952, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

ıg is subsection (b) of the present Section 81.18, quoted
of the Appendix to our opening brief:
tates of decedents dying before January 1, 1950. In
a decedent who died before January 1, 1950, property
e included in the gross estate under this section unless

A reservation for a 'period not ascertaina
out reference to his death' may be illustra
resolution of the right to receive, in quar
ments, the income of the transferred prope
none of the income between the last quar
ment and decedent's death was to be re
him or his estate; or by a reservation of a
following a precedent estate for life or a
years." (See T. D. 4868, 1938-2, C. B.
amended by T. D. 5741, 1949-2, C. B. 1
duced in C. C. H. Federal Estate & Gift
porter, ¶1460.01.)

Exactly the same differentiation between pre-June 6, 1932 transfers was made in the pre-1951 version of Section 81.19, in effect at the Selznick's death, relating to transfers with right to designate who shall possess or enjoy. (C. B. as *supra*; C. C. H. Federal Estate & Gift Tax ¶1470.01.)

Point 3. Section 811(d). Respondent says 21):

"* * * Here the settler had the powe
resent himself and the beneficiaries in petitio
court of competent jurisdiction at any time
the trust, provided, however, that no ar
should make it revocable. It seems clear
power would have justified any amendmen
by the settlor short of actually revoking
(see Restatement, Trusts (1935), Section
therefore the property is taxable under
811(d)."

eated on page 21) that "the settlor had the represent himself and the beneficiaries in peti- y court of competent jurisdiction at any time the trust" is not clear to us. The trust [Tr. y gives the trustor the right "to petition any competent jurisdiction * * * to amend nstrue." This does not give, it does not purport ny right to proceed *ex parte*. The "petition," e assumed, would have to follow regular and procedure. That procedure would require that iaries be made parties.

ifornia law is clear. In *Mitau v. Roddan,* 149 Pac. 145 (1906), a trust case, the court says

* * It is the general rule in equity, con- in force by the provisions of the Code of Procedure (sec. 389), that all who are inter- in the subject-matter of a litigation should be parties thereto, in order that complete justice be done, and that there may be a final determina- f the rights of all parties interested in the sub- matter of the controversy."

s v. Security Trust & Savings Bank, 208 Cal. Pac. 1026 (1929). The court says (p. 467):

* * It is manifest that in a controversy by ettler with the other settler and/or beneficiaries, ustee is in no sense the representative of either n. A trustee is given by statute the right to n execution of the powers conferred without g beneficiaries as plaintiffs, but this applies

The same rule applies where the purpose of
tion" is "to amend and/or construe."

Other California cases on the necessity of j
beneficiaries in suits where the relations *inter*
tlor, trustee or beneficiaries are involved ar
Dowd, 207 Cal. 290, 277 Pac. 1047 (1929);
Bank of California, 19 Cal. App. 2d 579, 65 I
(1937); *De Olazabal v. Mix,* 24 Cal. App. 2d
2d 787 (1937).

In *Carey v. Brown,* 92 U. S. 171, 23 L
(1875), the court says (p. 172):

> "The general rule is, that in suits respe
> property, brought either by or against th
> the *cestuis que* trust as well as the trustee
> essary parties. Story, Eq. Pl., sec. 207."

The court then enumerates certain exceptio
rule which are not material here.

Selznick, in reserving the power to petitio
"to amend and/or construe" the trust, did not
write a new code of procedure for himself, or
as to himself, long settled procedural requiren
would have been pulling at his bootstraps if
tempted to do so.

Point 4. Section 811(g). Insurance assets.
tended (Resp. Br. pp. 23-28) that the change i
assets which would result from surrender of the
this in turn resulting in Selznick's receiving
therefrom—is an "incident of ownership." N

'e ask the Court's indulgence in breaking up this into its component parts.

Right to economic benefits. Selznick had no such except a right to income (if the policies were dered), which right, if we are correct in our contention on this appeal, is insufficient to the proceeds into the taxable estate.

nust be remembered that under the statute, the cant thing as to insurance purchased with prem- paid on or prior to January 10, 1941 [an item 48,805.10 here, and the only insurance item in e, see Tr. p. 41] is the retention of an incident nership. To surrender for cash (the insured ing the cash), to pledge for loans, to change eneficiaries, are plain cases. They are rights tenant to and inseparable from ownership.

s retention of income (assuming it was retained h manner as to impose tax liability at all, which not admit) fall into the same category? Obvi- rights to income can and do exist in innum- cases quite irrespective of "ownership" on the f the person receiving the income. An income ciary of a trust has a right to income, but does ecessarily or even ordinarily have any "owner- except that right.

tion 811(g) plainly contemplates an "owner- which attaches to the policy or its proceeds. etention of a right to income, even if the Court that right to have been effectively retained as

January 10, 1941 (Section 503(a), Rever
1950, Op. Br., App. pp. 5-6).

b. *Power to change the beneficiary.* S
no such right.

c. *To surrender or cancel the policy.*
could surrender or cancel (the fact he h
the consent of two other persons is not i
But the surrender or cancellation did not
proceeds to return to him or give him an
them which he did not have before.
irrevocably disposed of under the trust. T
tion is not to be construed in such a way
to doubtful or incongruous results. It is
cases where the insured, through surrend
in specie, immediate benefits as to which a
he had only a promise. That is not the sitt

d. *To assign the policy.*

e. *To revoke an assignment.*

f. *To pledge the policy.*

g. *To obtain a loan against surrender*

Selznick had none of these rights.

The concluding sentence of the regulation
inapplicable.

We shall not review the cases cited by
(Br. p. 27) on this point. In all of them
elements of reversion (then important) or of c

new ground, and to predicate the essentials of
upon grounds which at best are shaky and
s, and which seem to us non-existent.

leference, we submit that the decision of the
t should be reversed in its entirety; and if this
lenied, that the minimum relief to which peti-
e entitled is the exclusion from taxability of
f the insurance purchased with premiums paid on
January 10, 1941.

Respectfully submitted,

WALTER L. NOSSAMAN,
JOSEPH D. BRADY,
Attorneys for Petitioners.

· 22, 1951.

United States
Court of Appeals
For the Ninth Circuit.

WING FOO,

Appellant,

vs.

ARD McGRATH, Attorney General of the
ed States,

Appellee.

Transcript of Record

**peal from the United States District Court,
Northern District of California,
Southern Division.**

United States
Court of Appeals
For the Ninth Circuit.

WING FOO,

Appellant,

vs.

WARD McGRATH, Attorney General of the ted States,

Appellee.

Transcript of Record

**peal from the United States District Court,
Northern District of California,
Southern Division.**

Note: When deemed likely to be of an important nature, doubtful matters appearing in the original certified record literally in italic; and, likewise, cancelled matter appearing original certified record is printed and cancelled herein When possible, an omission from the text is indicated by italic the two words between which the omission seems

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Order Denying Motion to Dismiss.....

Reporter's Transcript.....

Statement of Points.....

Witnesses, Plaintiff's:

Wong Wing Foo

—direct .....

—cross .....

Wong Yem

—direct .....

—cross .....

AND ADDRESSES OF ATTORNEYS

AND SING,
Montgomery St.,
Francisco, Calif.,
Attorneys for Appellant.

CEY TRAMUTOLO,
ed States Attorney,

R. BONSALL,
stant United States Attorney,
San Francisco, California,
Attorneys for Appellee.

Southern Division of the United States
rict Court, in and for the Northern Dis-
of California, Second Division

No. 29118-R

WING FOO,

Plaintiff,

vs.

ARD McGRATH, Attorney General of the
ted States of America,

Defendant.

MPLAINT FOR DECLARATORY
ENT TO ESTABLISH CITIZENSHIP

aintiff, Wong Wing Foo, and his attorneys,
Sing, complain of the defendant as follows:

I.

laintiff is a resident of the County of San
City of Lodi, State of California, wherein
tains his lawful domicile with his father,
em.

II.

the defendant is the duly appointed and
Attorney General of the United States,
such is the head of the Immigration and
zation Department of the United States,
amed herein in his official capacity as such.

III.

That the jurisdiction of this Court is
because plaintiff has a cause of action ag
defendant pursuant to the provisions of Se
of the Nationality Act of 1940, as amended
pursuant to Title 8, Section 903, Unite
Code Annotated.

IV.

That plaintiff is a citizen of the United

V.

That plaintiff was born on June 22,
Cheung Sing Village, Toyshan District, Ky
Province, China; that plaintiff's lawful blo
is Wong Yem, and that his lawful blood r
Lim Shee, lawful wife of the said Wong Y
the said Wong Yem is a citizen of the Unit
and was a citizen of the United States at
of plaintiff's birth in China; that the sa
Yem had resided in the United States
plaintiff's birth; that at birth, plaintiff wa
zen of the United States by reason of the
the United States then in full force an
to wit, Section 1993, United States Revis
utes, as amended (Act of February 10, 18
the said Lim Shee is a native and citize
Republic of China.

VI.

That the plaintiff departed from China
United States to join his said father and t

d arrived at the port of San Francisco,
, on November 26, 1948, via the Philip-
Lines, seeking admission to the United
a citizen thereof.

VII.

e plaintiff was detained by the Immigra-
Naturalization Service, Department of
said port, and restrained of his liberty
e United States; that a Board of Special
mposed of officers and employees of the
on and Naturalization Service of the
nt of Justice denied that plaintiff is the
od son of the said Wong Yem and is a
the United States, and ordered plaintiff's
from the United States to China as an
a citizen of China.

VIII.

e plaintiff took an appeal from said de-
the Commissioner of Immigration and
tion Service and to the Board of Immi-
ppeals, Department of Justice, who and
under the direction of, and are solely
e to, the defendant, as Attorney General
ited States; said Commissioner and said
Immigration Appeals affirmed the said
decision of the Board of Special Inquiry
rancisco, California, and dismissed the
appeal.

States on bond, pending the final disposit
appeal for admission to the United St
citizen in the penal sum of $1,000.00 re
plaintiff by said Immigration and Natu
Service, prior to plaintiff's temporary rel
custody.

X.

That because of all the said decision
officers of the Department of Justice, pla
denied his right and privilege to enter a
main in the United States as a citizen the
plaintiff, having been denied by the Atto
eral of the United States, who is the he
Department of Justice of the United S
right to enter and reside permanently in t
States as a citizen thereof, now brings t
complaint and prays as follows:

(1) That a judgment be entered decl
plaintiff, Wong Wing Foo, is a citizen of t
States.

(2) That the defendant be directed
the plaintiff from the custody or contr
Immigration and Naturalization Service.

(3) That the defendant cancel and set
order for plaintiff's deportation to Chin
exonerate said appearance and departure

(4) For such other and further relief
Court may seem just and proper and the
the case may require.

ates of America,
alifornia,
County of San Francisco—ss.

Ving Foo, being first duly sworn, deposes
as follows:
is the plaintiff named in the foregoing
; that the same has been read and ex-
him and he knows the contents thereof;
ame is true of his own knowledge except
matters which are therein stated on his
n and belief, and as to those matters he
to be true.

/s/ WONG WING FOO.

ed and sworn to before me this 8th day
ber, 1949.

/s/ ALBERT K. CHOW,
ublic in and for the City and County of
rancisco, State of California.

mission expires March 26, 1951.

ed]: Filed September 8, 1949.

District Court and Cause.]

MOTION FOR DISMISSAL

ow the defendant herein, J. Howard Mc-
Attorney General of the United States,
g an appearance in the nature of a special

ern District of California, and Edgar R
Assistant United States Attorney for the
District of California, moves the Court t
the complaint in the above-entitled actio
following reasons:

(1) That the complaint fails to show a
action against the defendant in this jurisd
the reason that it fails to show that plai
ever a permanent resident of the Northern
of California and within the jurisdictio
Court.

(2) That under Section 503 of the N
Act of 1940 (54 Stat. 1171, 1172; Title 8,
903) this Court is without jurisdiction of
ject matter of this suit for the reason
complaint fails to show that plaintiff clai
manent residence at any place in the Unit
or within the Northern District of Calif
within the jurisdiction of this Court, as
by Section 503 of the Nationality Act of

This motion will be based on the prov
Section 503 of the Nationality Act of
U.S.C.A. 903), which provides that an
this nature must be brought in the Distr
of the United States for the District of
or in the District Court of the United S
the district in which such person claims p
residence; also on plaintiff's complaint no
with the Court and the affidavit of Lloyd I
Assistant District Adjudications Officer o

nited States Immigration and Naturaliza-
ice at San Francisco, California, show that
tiff, Wong Wing Foo, is not now a perma-
dent of the United States, and further that
ntiff, Wong Wing Foo, in truth and fact
r crossed the Immigration barrier and in
ation of law has never been legally ad-
o the United States for permanent resi-

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ EDGAR R. BONSALL,
Assistant U. S. Attorney,
Attorneys for Defendant.

rsed]: Filed October 19, 1949.

District Court and Cause.]

AFFIDAVIT

E. Gowen, being first duly sworn, on oath
nd says:

e is Assistant District Adjudications Offi-
igration and Naturalization Service, Port
rancisco; that in connection with his official
such he is joint custodian of the files of
igration and Naturalization Service at
of San Francisco, California; that he is
with the contents of the file of the Immi-

Foo, bearing number 1300-85974; that th
the said Wong Wing Foo shows that he a
the Port of San Francisco, California, on
ber 26, 1948, aboard the Philippine Air Li
and applied for admission to the United
the foreign-born son of a citizen of the
States; that Wong Wing Foo was tempor
tained by the Immigrant Inspector abo
Philippine Air Lines plane upon his arr
that he was thereafter held for examinat
Board of Special Inquiry; that the Boar
he was an alien and not a citizen of the
States; that on December 16, 1948, Wong W
was refused admission to the United Sta
Board of Special Inquiry on the ground
was an immigrant alien not in possession o
immigration visa as required by Section
of the Immigration Act of May 26, 1924 (
213) and under executive Order 8766, and
not in possession of a passport; that pend
disposal of his case by the Immigration an
ralization Service the subject was releas
custody upon the giving of an appearance
the sum of $1,000 on December 13, 1948;
subject's appeal from excluding decision
Board of Special Inquiry was dismissed
Commissioner of the Immigration and Na
tion Service, at Washington, D. C., on Febr
1949; that his further appeal was dismisse
Attorney General's Board of Immigration

r temporary or permanent residence or for
r purpose whatsoever.

er deponent saith not.

/s/ LLOYD E. GOWEN.

ribed and sworn to before me this 19th day
er, 1949.

/s/ EDWARD C. EVENSEN,
Clerk, U. S. District Court, Northern Dis-
of California.

rsed]: Filed October 19, 1949.

District Court and Cause.]

ER DENYING MOTION TO DISMISS

action filed in this Court on September 8,
intiff seeks to avail himself of the declara-
ef accorded by Section 503 of the National-
of 1940 (54 Stat. 1171, 8 U.S.C. 903), to
his claimed United States citizenship.
503 permits any person, within the United
abroad, who is denied the right of a na-
f the United States by any government
r department on the ground that he is not
al, to institute an action for a judgment
g him to be a national. The action may be
either in the District Court for the District
bia or in the District Court of the district

plaintiff's father, Wong Yem, is now a
citizen of the United States at the time
tiff's birth in China on June 22, 1928. On
ber 26, 1948, plaintiff, for the first time, a
the United States to join his father, who
sides in Lodi, Northern District of Ca
Upon his arrival, he was detained by the I
tion and Naturalization Service, and, after
ing by a Board of Special Inquiry, wa
admission, on December 16, 1948, on the
that he had failed to prove that he is th
Wong Yem. The Commissioner of Imm
and Naturalization affirmed the action on I
24, 1949, as did the Board of Immigration
on July 20, 1949. Pending the outcome of
ministrative proceedings, plaintiff had been
on bond on December 13, 1948. Since that
has resided with his father at Lodi, Califor

Defendant has moved to dismiss on two
(1) that the plaintiff cannot in good faith
permanent residence within the jurisdictio
Court; (2) that Section 503 was intended
only to persons who at one time had perm
resided in the United States and who enc
difficulties in returning after a temporary
abroad because of the more stringent provi
the expatriation sections of the Nationality
1940.

In an opinion in the case of Look Yu
Acheson, #28984, filed today, Judge Erskin

g an action under Section 503, and in this
en though he now lives and always has
oad. The plaintiff here is in an even
position inasmuch as he has been residing
strict for more than a year.

tion to dismiss is denied.

December 15, 1949.

/s/ LOUIS GOODMAN,
United States District Judge.

sed]: Filed December 16, 1949.

District Court and Cause.]

ANSWER TO COMPLAINT

now Howard J. McGrath, as Attorney
of the United States, Defendant in the
ion, by and through his attorneys, Frank
ssy, United States Attorney, and Edgar
l, Assistant United States Attorney, and
to Plaintiff's complaint admits, denies
es as follows:

I.

ing Paragraph I of the complaint, De-
lenies that Plaintiff is a resident of the
f San Joaquin, City of Lodi, State of
, and affirmatively states that Plaintiff is
nd never has been a resident within the

maintains a lawful domicile with his
father, Wong Yem, and affirmatively ass
Plaintiff has no lawful domicile in the
California or elsewhere in the United St
that Wong Yem is not the father of Plaint

II.

Admits the allegations contained in Para
of the Complaint.

III.

Answering Paragraph III of the Compl
fendant denies the allegations contained
graph III of the Complaint and affi
asserts that Plaintiff does not have a
action against the Defendant pursuant to
visions of Section 503 of the Nationality
amended and/or pursuant to Section 90
code annotated.

IV.

Answering Paragraph IV of the Compl
fendant denies that Plaintiff is a citizen
national of the United States and affi
alleges that Plaintiff is a citizen and na
China.

V.

Answering Paragraph V of the Compl
fendant denies the allegations contained
graph V of the Complaint that Plaintiff
on June 22, 1928, at Cheung Sing Village,
District, Kwangtung Province, China; de

he said Wong Yem; admits that Wong
citizen of the United States and was a
the United States on June 22, 1928; ad-
Wong Yem resided in the United States
June 22, 1928; denies that at birth Plain-
citizen and/or a national of the United
reason of Section 1993, United States
Statutes, or in any other manner whatso-
affirmatively states that Plaintiff is not
never has been a citizen and/or a national
nited States; admits that Lim Shee is a
d citizen of the Republic of China.

VI.

ant admits that the Plaintiff departed
na for the United States for the purpose
g his alleged father. Defendant has no
e as to Plaintiff's allegation that he in-
ereafter to reside in the United States
full advantage of the rights and privileges
l States citizenship and likewise to per-
duties as a citizen and/or national of the
tates and for that reason denies such alle-
admits that Plaintiff arrived at the Port
rancisco, California, on November 26, 1948,
ppine Air Lines, seeking admission to the
tates as a citizen thereof.

VII.

the allegations contained in Paragraph

VIII.

Admits the allegations contained in P
VIII of the Complaint.

IX.

Denies that the Plaintiff was ever ad
the United States on bond or otherwise, bu
tively alleges that Plaintiff was tempo
leased from the custody of the Immigr
Naturalization Service on December 13, 1
the filing of a bond in the sum of $1,000 co
upon his return to custody of the Immigr
Naturalization Service should his appeal
excluding decision be dismissed.

X.

Admits that the Plaintiff has been d
right and privilege to enter or remain in t
States as a citizen and/or national of th
States, and affirmatively alleges that the
has no right or privilege to enter or rem
United States, and that Plaintiff is not
and/or national of the United States.

Wherefore, Defendant prays that the C
herein be dismissed: that the relief pray
denied, and that Defendant recover from
his proper costs herein.

/s/ FRANK J. HENNESS
United States Attor
/s/ EDGAR R. BONSALL,
Assistant U. S. Atto

District Court and Cause.]

AMENDED ANSWER

now Howard J. McGrath, as Attorney of the United States, Defendant in the ion, by and through his attorneys, Frank ssy, United States Attorney, and Edgar R. Assistant United States Attorney, and in Plaintiff's complaint, admits, denies and follows:

I.

ring Paragraph I of the complaint, De- denies that Plaintiff is a resident of the of San Joaquin, City of Lodi, State of a, and affirmatively states that Plaintiff is and never has been a resident within the California, or elsewhere in the United Defendant further denies that Plaintiff a lawful domicile with his putative Wong Yem, and affirmatively asserts that has no lawful domicile in the State of a or elsewhere in the United States, and g Yem is not the father of Plaintiff.

II.

the allegations contained in Paragraph II mplaint.

III.

ring Paragraph III of the Complaint, De- denies the allegations contained in Para-

against the Defendant pursuant to the p
of Section 503 of the Nationality Act as
and/or pursuant to Section 903 of the co
tated.

IV.

Answering Paragraph IV of the Compl
fendant denies that Plaintiff is a citizer
national of the United States, and affir
alleges that Plaintiff is a citizen and na
China.

V.

Answering Paragraph V of the Compla
fendant denies the allegations contained
graph V of the Complaint that Plaintiff
on June 22, 1928, at Cheung Sing Village,
District, Kwangtung Province, China; de
Plaintiff's lawful blood father is Wong
that his lawful blood mother is Lim Shee
wife of the said Wong Yem; admits tha
Yem is a citizen of the United States an
citizen of the United States on June 22, 1
mits that Wong Yem resided in the Unite
prior to June 22, 1928; denies that at birt
tiff was a citizen and/or national of the
States by reason of Section 1993, Unite
Revised Statutes, or in any other manner
ever, and affirmatively states that Plaintif
now and never has been a citizen and/or a
of the United States; admits that Lim S
native and citizen of the Republic of China

VI.

dant admits that the Plaintiff departed ina for the United States for the purpose ng his alleged father. Defendant has no ge as to Plaintiff's allegation that he in- hereafter to reside in the United States full advantage of the rights and privileges ed States citizenship and likewise to per- duties as a citizen and/or national of the States and for that reason denies such alle- admits that Plaintiff arrived at the port Francisco, California, on November 26, 1948, ippine Air Lines, seeking admission to the States as a citizen thereof.

VII.

s the allegations contained in Paragraph he Complaint.

VIII.

s the allegations contained in Paragraph the Complaint.

IX.

that the Plaintiff was ever admitted to the States on bond or otherwise, but affirma- leges that Plaintiff was temporarily re- rom the custody of the Immigration and zation Service on December 13, 1948, upon of a bond in the sum of $1,000 conditioned return to custody of the Immigration and

X.

Admits that the Plaintiff has been de
right and privilege to enter or remain in th
States as a citizen and/or national of th
States, and affirmatively alleges that the
has no right or privilege to enter or rema
United States, and that Plaintiff is not
and/or national of the United States.

XI.

As a further and affirmative answer to F
complaint the Defendant admits that the
at the time of his arrival at the port of S
cisco, California, on November 26, 1948, vi
pine Air Line plane, made application for a
to the United States as a citizen of th
States and presented his claim before a
pointed and qualified Board of Special
under Section 17 of the Immigration Act
ruary 6, 1917 (8 U.S.C. 153); that Plai
excluded from entering the United States
Board of Special Inquiry on December 9,
an alien immigrant not in possession o
documents; that said excluding decision
affirmed by the duly appointed represen
the Attorney General of the United Sta
that the decision of the Board of Special
is final under Section 17 of the Immigra
of 1917 (8 U.S.C. 153). Therefore the fi
the Board of Special Inquiry in this cas

dismissed; that the relief prayed for be
d that Defendant recover from Plaintiff
costs herein.

/s/ FRANK J. HENNESSY,
United States Attorney.
/s/ EDGAR R. BONSALL,
Assistant U. S. Attorney.

sed]: Filed March 14, 1951.

In the United States District Court for t
ern District of California, Southern D
No. 29118-R

WONG WING FOO,

Pla

vs.

J. HOWARD McGRATH, Attorney Gene
United States,

Defen

CHOW AND SING,
550 Montgomery Street,
San Francisco, California,
Attorneys for Plaintiff.

FRANK J. HENNESSY,
United States Attorney,

EDGAR R. BONSALL,
Assistant United States Attorney,
Post Office Building,
San Francisco 1, California,
Attorneys for Defendant.

OPINION

Murphy, District Judge.

This is an action brought under Secti
the Nationality Act of 1940 (54 Stat. 1171
903), for the purpose of establishing the c
and nationality of the plaintiff.

aintiff, Wong Wing Foo, was born in
June 22, 1928. He first arrived in the
States at San Francisco, California, on
26, 1948, at which time he applied for
under the provisions of 8 U.S.C.A.—
Section 1993, U.S.R.S.), as the foreign-
of one Wong Yem, an American citizen.
of Special Inquiry was convened at the
after six days of hearings it concluded
tiff was not the son of Wong Yem. The
oner of Immigration and the Board of
ion Appeals affirmed this decision and the
was ordered excluded from the United
Pending the hearing of this suit which
udicial declaration of his citizenship, de-
as resided, under bond, with his alleged
Lodi, California.

trial no documentary evidence of the pur-
lationship was introduced. Plaintiff and
m testified that they were father and son,
had not seen each other since the plaintiff
ears old, and that with the exception of
ters written in 1945 and 1947 that there
no contact between them for a period of
years. No letters were produced in con-
of this correspondence.

ant contented himself with introducing
s of the Immigration hearings. They con-

They are replete with contradictions a
sistencies.

At one point the alleged uncle told o
with this nephew in China during 1946
Plaintiff corroborated and enlarged on t
Wong Gong then was shown a picture of
tiff. He not only could not identify the su
later withdrew all his former testimon
having ever seen Wong Wing Foo, an
verted other vital details of plaintiff's tes

Another material contradiction appea
testimony regarding the name of the
mother. Plaintiff said it was "Lim Sun S
alleged father, however, stated that it w
Ling Heung." When plaintiff's attentio
rected to this variance he testified that
didn't know her name, but having seen
acters for "Sun Sun" written in a bo
house he had assumed they were his mothe

Discussion

It is plaintiff's contention that he has
a prima facie case of citizenship in that
and Wong Yem testified to the purporte
son relationship and defendant introduce
dence in contravention thereof than the
taken before the Immigration Board.

As stated in Siu Say v. Nagle, 295 F. 6

"In cases of this character experi

is therefore had to collateral facts for cor-
ration or the reverse."
llateral facts in this instance are to be
the transcripts introduced by the de-

ted above, they contain conflicting and
contradictory statements as to such facts
ner the alleged uncle, Wong Gong, had
laintiff in China on numerous occasions
946 and 1947; whether Wong Gong knows
on who purports to be his nephew, and the
plaintiff's alleged mother. Discrepancies
articulars are not the kind that arise from
of the human mind. Testimony of the
ncle was vital in that he was the only
resented by the plaintiff who could estab-
k of identity between the adult now seek-
ssion and the six-year-old boy that Wong
ports to have left in China. His refusal
fy Wong Wing Foo and his denial of
s testimony was given great weight by the
tion Department. Plaintiff knew this. He
avoid seeing the shadow it threw over his
et, significantly, he made no effort to bring
ng before this tribunal. He charges in his
t Wong Gong lied—yet he was careful not
ne lie to him before this court. Such an
hardly accords with plaintiff's present
ions of forthrightness.
plaintiff attempts to explain away his in-

suggests that "it is highly improper for a
married woman to be known by her name
this the Commissioner of Immigration, v
case was before him on appeal, stated:

> "(W)e believe that the applicant
> alleged father should have been able
> on the name of the applicant's mothe
> are in truth, father and son. Certainl
> the applicant did not know his mothe
> there is no reason for inventing one
> unless for the purpose of attempting t
> a fraudulent case."

The examples fixed on above are but ill
of the discrepancies and contradictions wi
the testimony abounds.

Although, as a practical matter, it would
the decision in this case, defendant's su
that when a person in plaintiff's position h
action under Section 503 "he is entitle
greater review (of the administrative acti
on habeas corpus," is deserving of comme
is the same contention that was befor
Holtzoff in Mah Ying Og v. Clark, 81 F
696, D.C. Dist. Col., and Judge Hall in G
Tung v. Clark, 83 F. Supp. 482, D.C. Cal.
these jurists held that to give such a con
to this section would be practically to nulli
stated by Judge Holtzoff, Section 503 "cont
a trial de novo of the issue of citizenship

lering and wanting people a birthright of States citizenship is beyond value. And, the claim itself should be minutely scrutiis section plainly assumes that no claimant turned away without first being accorded udicial safeguard afforded by our demo-rstem.

iff has had the opportunity, in this action, his patrimony. Upon him was the burden lishing it by a preponderance of evidence. te Delaney, 72 F. Supp. 312, affirmed 170 9; Bauer v. Clark, 161 F. 2d 397, certiorari 8 S. Ct. 210, 332 U.S. 839; rehearing denied t. 342, 332 U.S. 849). This he has failed

nent for the defendant.

ngs of fact and conclusions of law will be l in accordance with the rule.

: April 3, 1951.

rsed]: Filed April 3, 1951.

District Court and Cause.]

NGS OF FACT AND CONCLUSIONS OF LAW

bove-entitled cause, initiated pursuant to of October 14, 1940, C. 876, Title I, Sub-

on the 15th day of March, 1951, at 10:00
fore the Honorable Edward P. Murphy, t
presiding, sitting without a jury; plaintif
ing by his attorneys, Jack W. Chow and
Sing, and the defendants by their attorney
J. Hennessy, United States Attorney for th
ern District of California, and Edgar R.
Assistant United States Attorney for said
and the evidence having been received,
Court having fully considered the same
make the following Findings of Fact a
clusions of Law:

I.

That the plaintiff, Wong Wing Foo,
in China on June 22, 1928.

II.

That the plaintiff first arrived in th
States at San Francisco, California, on
26, 1948, at which time he applied for a
under the provisions of 8 U.S.C.A.—601(
tion 1993 U.S.R.S.) as a citizen of th
States, to wit: As the foreign-born son
Yem, an American citizen.

III.

That thereupon plaintiff was accorded a
by a Board of Special Inquiry at San F
California, following which hearing said
December 9, 1948, found that plaintiff wa

IV.

aintiff thereon appealed from the decision
d Board of Special Inquiry to the Com-
of Immigration who, on February 24,
ned the excluding decision of said Board
Inquiry.

V.

ereupon the said plaintiff appealed from
on of the Commissioner of Immigration
rd of Immigration Appeals who, on July
dismissed the appeal of the plaintiff and
aintiff excluded from the United States.

VI.

December 13, 1948, plaintiff was tempo-
ased under bond by defendant and since
plaintiff has been residing at Lodi, Cali-

VII.

March 15, 1951, plaintiff and Wong Yem
the trial before this Court of the above-
use.

VIII.

is Court, having fully considered all the
ubmitted at the trial of the above-entitled
ls that plaintiff is not the son of Wong

Conclusions of Law

I.

Title I, Subchapter V, Section 503, 54 S
also known as Title 8 U.S.C.A., Section 9

II.

That plaintiff is not a national or citi
United States.

It Is Hereby Ordered that judgment
denying said Petition for Declaration of N
and that the defendant is entitled to
against plaintiff for his proper costs.

/s/ EDWARD P. MURPH
United States Distr

Approved as to form.

/s/ WILLIAM J. CHOW,
Attorney for Plainti

Receipt of Copy acknowledged.

[Endorsed]: Filed April 18, 1951.

e United States District Court for the
District of California, Southern Division

No. 29118-R

VING FOO,

Plaintiff,

vs.

ARD McGRATH, Attorney General of
nited States,

Defendant.

FINAL DECREE

ove-entitled cause, having come on for
the 15th day of March, 1951, at 10:00
m., before the Honorable Edward P.
the Judge presiding, Jack W. Chow and
Sing appearing as attorneys for the plain-
named, and Frank J. Hennessy, United
torney for the Northern District of Cali-
nd Edgar R. Bonsall, Assistant United
torney, appearing as attorneys for the de-
bove named, and the evidence having been
nd the Court having heard oral argument
nsel for the respective parties and having
Findings of Fact and Conclusions of Law:
erefore, by reason of the law and facts, it
d, Adjudged and Decreed by the Court as

I.

That the Court finds in favor of the
and against the plaintiff, and specifically
(1) That the plaintiff is not the son
Yem.
(2) That by reason of the foregoing,
is not a national or citizen of the United

II.

That the defendant recover his proper
this action. Judgment will be entered ac

Dated: April 18th, 1951.

/s/ EDWARD P. MURPHY
United States Distri

Approved as to Form:
Dated: April 6, 1951.

/s/ WM. J. CHOW,
CHOW & SING,
Attorneys for Plain

Lodged April 9, 1951.

[Endorsed]: Filed April 18, 1951.

Entered in Civil Docket April 19, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given this 4th day of

judgment of this court entered on the 18th April, 1951, in favor of defendant against ntiff.

CHOW & SING,

By /s/ WM. J. CHOW,
Attorneys for Plaintiff.

rsed]: Filed June 4, 1951.

District Court and Cause.]

COST BOND ON APPEAL

as, Wong Wing Foo, Plaintiff herein, has l or is about to prosecute an appeal to the States Circuit Court of Appeals for the rcuit from a judgment made and entered 3th, 1951, by the District Court of the States for the Northern District of Cali- outhern Division.

herefore, in consideration of the premises, rsigned, Fidelity and Deposit Company of l, a corporation duly organized and exist- r the laws of the State of Maryland and horized and licensed by the laws of the California to do a general surety business tate of California, does hereby undertake nise on the part of J. Howard McGrath, General, Defendant, that they will prose- r appeal to effect and answer all costs if

($250.00) Dollars, to which amount said
and Deposit Company of Maryland acknow
self justly bound.

And further, it is expressly underst
agreed that in case of a breach of any con
the above obligation, the Court in the abov
matter may, upon notice to the Fidelity and
Company of Maryland, of not less than
days, proceed summarily in the action o
which the same was given to ascertain th
which said Surety is bound to pay on ac
such breach, and render judgment therefo
it and award execution therefor.

Signed, sealed and dated this 4th day
1951.

FIDELITY AND DEP
COMPANY OF MAR

[Seal] By /s/ E. DELVENTHAL,
Attorney-in-Fact.

Attest:

/s/ S. CLIMO,
Agent.

The premium charged for this bond is $
annum.

State of California,
City and County of San Francisco—ss:

On this 4th day of June, A.D. 1951, be
Belle Jordan, a Notary Public in and for

oned and sworn, personally appeared
elventhal, Attorney-in-Fact, and S. Climo,
f the Fidelity and Deposit Company of
l, a corporation known to me to be the per-
executed the within instrument on behalf
rporation therein named and acknowledged
at such corporation executed the same, and
wn to me to be the persons whose names
cribed to the within instrument as the At-
-Fact and Agent respectively of said corpo-
nd they, and each of them, acknowledged
t they subscribed the name of said Fidelity
osit Company of Maryland thereto as prin-
their own names as Attorney-in-Fact and
spectively.

ness Whereof, I have hereunto set my hand
ed my official seal at my office in the City
nty of San Francisco the day and year first
itten.

/s/ BELLE JORDAN,
Public in and for the City and County of
Francisco, State of California.
mmission Expires Nov. 9, 1951.

rsed]: Filed June 8, 1951.

In the District Court of the United State
Northern District of California, South
sion

Before: Hon. Edward P. Murphy,
Judge.

No. 29118

WONG WING FOO,

Plai

vs.

J. HOWARD McGRATH, Attorney Gen
the United States,

Defen

REPORTER'S TRANSCRIPT

Thursday, March 15, 1951

Appearances:

For the Plaintiff:

W. J. CHOW, ESQ.,
JACK W. SING, ESQ.

For the Government:

EDGAR R. BONSALL, ESQ.,
Assistant United States Attor

The Clerk: Wong Wing Foo vs. McG
trial.

Mr. Bonsall: Ready. This case, Your
wanted to see if certain admissions can

Court probably knows, the plaintiff is a
nd he doesn't speak English. Unless we
ify some of the issues, the testimony taken
n interpreter on cross-examination will be
gthy. However, certain statements have
n from the plaintiff and one of the wit-
o will be produced, he is putative father,
board of special inquiry, and if counsel
ulate that the testimony was taken before
of special inquiry in the case of the father
t might save time. Otherwise I will have
ch question and answer separately through
reter.
t state that the records of the board of
quiry is a record required to be kept by
tment of Justice. It is kept pursuant to

ow: It is admitted just for the purpose
g that such a record exists, but not as
th of the facts so stated. I believe since
itutes a trial de novo, I believe we should
statements from the witnesses [2*] and
statements made and contained in the
ion files given by the witness could only
r impeachment purposes.
urt: In other words, you don't accept the
n, is that right?
ow: That is right.
urt: All right. Let me advise you right

Mr. Chow: Your Honor please, we will this, that such statements exist.

Mr. Bonsall: Do you admit to the tru statement, that it is a truthful statement

Mr. Chow: No, because that is within say rule.

Mr. Bonsall: I still think we are goi the testimony in before the board. It is a ment record, duly certified.

The Court: We will meet that when to it.

Mr. Bonsall: All right.

Mr. Chow: Shall I proceed?

The Court: Proceed.

Mr. Bonsall: I might state what ou will be. It is simply the fact that he is no son of the father.

Mr. Chow: And we believe that is no Your Honor. [3]

(Thereupon Robert Park was swo terpreter.)

WONG YEM

called as a witness on behalf of the plaint first duly sworn, testified through the In as follows:

The Clerk: Please state your name to t

A. Wong Yem.

Direct Examination

y of Wong Yem.)
na.
en?
nese Republic, the second year.
o is your father?
nsall: We will stipulate he is a citizen,
or. This particular witness is a citizen of
States.
w: Thank you.
Mr. Chow): What is your father's
A. Sare Wong.
ere is he now? A. In China.
proximately how old is he?
ut seventy-three.
at is your mother's name?
n Sui.
he living? [4] A. Yes.
old is she, approximately?
ut sixty-one.
ere do they live now?
China.
you married, Mr. Wong Yem?
.
o are you married to? A. Lim She.
ere is Lim She living now?
China.
e you any brothers and sisters?
ave four brothers, no sisters.
at are the names of your brothers?

(Testimony of Wong Yem.)

Q. You say you have four brothers? include yourself? A. Yes.

Q. Is Wong Dim married? A. Y

Q. Who is his wife? A. Lee Sh

Q. Is Wong Sang married? A.

Q. Who is his wife? [5] A. Ho

Q. Is Wong Gong married?

A. Wong Gong's wife Hom She.

Q. Then who is the wife of Wong Sin

A. Ng She.

Q. Can you tell me if Wong Gong family outside of his wife?

A. He has a wife and children.

Q. Will you describe his children, ple

A. Two daughters and one son.

Q. Do you know how old they are?

A. One two years old, one a little ove and one a few months old.

Q. Where is Wong Gong? A. In

Q. Has Wong Sing any children.

A. I don't know whether he has or not. back already.

Q. Has Wong Dim any children?

Q. What is his name and age?

A. About two and a half years of ag

Q. Have you any children?

A. I have four.

Q. Who are they?

ny of Wong Yem.)
ong Foo is here, and three boys in China.
here is Wong Gay? A. In China.
ong Hong? A. In China.
d Wong Keong? A. In China.
Wong Wing Foo married? A. Yes.
ho is his wife? Who is he married to?
m She.
e your other sons married? A. No.
ace your first arrival in the United States
y times have you been to China?
vice, altogether.
hen did you leave and when did you return
of the said trips?
e Republic, 16th year, I went to China.
Republic 18th year came back. Republic
I went.
nsall: I wonder if the Interpreter would
n in our calendar? I have some difficulty
Chinese years.
ow: May I have a calendar? [7]
inese Republic 23rd year, came back.
nsall: What year would that be?
ng: That is 1934.
y Mr. Chow): When did you say you
ried, Mr. Wong Yem?
inese Republic 16th year.
at was during the first trip to China?
s.
hen was Wong Wing Foo born?

(Testimony of Wong Yem.)

Mr. Chow: Excuse me.

Q. (By Mr. Chow): Date of marriage

A. Chinese Republic 16th year.

Mr. Sing: That is 1927.

Mr. Bonsall: Do you have the month a

Mr. Sing: Month and day?

A. Seventh month, fourth day.

Mr. Sing: That would be August 1st, 19

Mr. Bonsall: Do you intend to cover th absent facts?

Mr. Chow: No. I wanted to get the dates purpose is to show he was in China at when the child, the plaintiff, was born.

Q. (By Mr. Chow): When was Won Foo born? [8]

A. Chinese Republic 17th year, fifth mo fifth day.

Mr. Sing: That would be June 22nd, 19

Mr. Bonsall: Correct, as to the date.

Q. (By Mr. Chow): In other words Wing Foo was born during your first visit to

A. Yes.

Q. How old was Wong Wing Foo when saw him in China?

A. About six years of age. About six age.

Q. How long was your second visit to C

A. You mean the last time?

Q. Yes, fifth

ny of Wong Yem.)
onsall: Do you have the month there?
nterpreter: Ninth month, 29th day.
ng: That would be November 8th, 1931.
By Mr. Chow): When did you return from
?
hinese Republic the 23rd year, the sixth
he third day.
ng: That would be July 14th, 1934.
By Mr. Chow): During the time you were
on these visits where were you living?
heung Sing Village.
that your native village? [9]
es.
uring your visits to China after your son
Ving Foo was born you had occasion to see
e often? A. Yes.
ou were living in the same house with him?
es.
ow large was Cheung Sing Village?
bout eleven homes, or eleven houses and a

here was your house located?
n the second row, the fifth house.
here are you living now, Mr. Wong?
odi.
hat is your occupation? A. Cook.
here is your son, Wong Wing Foo, living?
e lives at Stockton.

(Testimony of Wong Yem.)

English. I left him in Stockton to go t
where he has better situation to study.

Q. When Wong Wing Foo was adm
bond——

Mr. Bonsall: Just a minute. I don't
has been admitted. He was released on
never crossed the Immigration Barrier. [10

Mr. Chow: That is right.

The Court: He was released in custod
Immigration Service December 13th, 19
filing of bond.

Q. (By Mr. Chow): Where was he livi
diately after his release?

A. He lived with me for some months.

Q. You say he is living in Stockton, Ca
How far is Stockton from Lodi?

A. About 13 or 14 miles.

Q. How often do you see him, or does
you?

A. Any time, my day off, I go to see h

Q. Has he been to visit you? A.

Q. How often? A. At least once

Q. Are you contributing to his support

A. Yes.

Q. Is Wong Wing Foo working?

Q. What is he doing in Stockton?

A. Go to school.

Mr. Chow: That is all.

Cross-Examination

y of Wong Yem.)
n, was seen by you at the age of six, [11]
the next time you saw him?
aven't been to China since I saw him
as six.
you see your son in China or anywhere
e time he was six years old and the time
val here at the port of San Francisco?
except the date of the hearing.
Ving Foo married? A. Yes.
you know his wife's name?
n She.
ere is she? A. In China.
e you ever seen her since the time of the
arriage?
I haven't been to China.
urt: That is the plaintiff's wife, Mr.
ou refer to?
sall: The son's wife.
rt: That is what I mean, the plaintiff.
sall: Yes, the son's wife.
Mr. Bonsall): Does your son have any
your reputed son have any children?
mean my oldest son?
one that is seeking for declaratory judg-
tizenship? [12]
, he has a son.
at is his name? A. Wong Falk.
e you ever seen him? A. No.

(Testimony of Wong Yem.)

Q. Does he have any church or othe showing the birth of the son in China?

Mr. Chow: I object to that. I believe been answered by the witness in his last

Mr. Bonsall: Rather ambiguous answ

The Court: He said there are no reco village. Now he is asking if there is a record of any kind.

A. They have a school there, not school; they don't have any record.

Q. (By Mr. Bonsall): The Chinese S ords show the birth in China?

A. I believe not.

Q. You believe not? Have you receive ters from your son at any time from Chi

A. Yes.

Q. Do you have any of those letters?

A. No, nothing important. I didn't any.

Q. Do you have any letters of any kind important or not, received by you from

A. No.

Mr. Chow: I object to this line of qu I don't see the relevancy as to the relation Honor.

The Court: Objection overruled.

Q. (By Mr. Bonsall): How much any, did you send to China for the suppo

y of Wong Yem.)
I understand your testimony correctly
you only had one brother in the United
A. I have three brothers here.
ee brothers here? One of them is Wong
hat correct? A. Wong Din.
ng Gong. Do you have a brother by the
Wong Gong? A. Yes.
ıe here in the United States?
.
ere does he live?
ı Francisco.
at address in San Francisco?
onoma Street. [14]
you have Wong Gong as a witness before
l Board of Inquiry convened here in San
in the case of Foo?
ow: I object to that. I don't see the
of that.
ırt: The record of that would be the best
Objection sustained.
Mr. Bonsall): Do you have Mr. Gong
ourt today?
ow: Also objected to.
ırt: Overruled.
Gong, you mean?
Mr. Bonsall): Wong Gong?

Wong Gong married? A. Yes.
at is his wife's name?

(Testimony of Wong Yein.)

A. Same place, Sonoma Street.

Q. Is she in Court today?

A. No, she is not.

Q. When was Wong Gong married?

A. Summer of the Chinese Republic 36th year.

Q. What are the names of the other tw who are [15] living in the United States

A. Wong Din and Wong Sing.

Q. Where does Wong Din live?

A. Lives in the city.

Q. What address does he live at?

A. He goes in and out of Jackson Stre

Q. Is he married? A. Yes.

Q. What is his wife's name? A.

Q. Is he here in Court? A. No.

Q. Where does Wong Sing live?

A. He lives somewhere in the country.

Q. Do you know any better address th lives somewhere in the country?

A. Somewhere near San Diego. But h see me a little while ago. He has got some job there so he didn't give me any address.

Q. Did I understand he doesn't know is at the present time? Is that correct?

Mr. Chow: I object to that. I think he answered that question.

The Court: Not to my satisfaction. Ov

A. No, I don't know. I didn't under

ny of Wong Yem.)
y Mr. Bonsall): And what is the name
ife? A. Lim Shi.
l you testify before the Board of Special
onvened in the case of Wong Wing Foo
San Francisco on December 6th, 7th and
A. Yes.
l this gentleman here in Court preside at
al Board of Inquiry hearing, Mr. Bert
A. Yes, both of them.
t particularly Mr. Norris was the presiding
hat correct?
s, the second time.
l you have Mr. Wong Gong as a witness
t Special Board of Inquiry?
e first time he was there, but he went—
ne went there the second time I don't re-

l you talk with Mr. Wong Gong about the
given before the Board of Special In-

idn't tell him anything particular. I told
on came.
ell, did you talk with Mr. Wong Gong
had testified before the Board of Special

ow: I don't see the relevancy.
urt: What is the purpose of that, whether
[17] to him after?
onsall: The purpose is to show what

witness Wong Gong, who is not here at th
time.

Mr. Chow: I believe if you wish to go i
you should have Wong Gong here. I do
whether he is using that for the purpos
peaching the witness or not.

Mr. Bonsall: At this time—it is a litt
order—at this time I will ask be marked fo
cation a certified copy of the record of the
ment of Justice in connection with the Speci
of Inquiry Hearing held on December 6th,
1948.

Mr. Chow: For what purpose?

Mr. Bonsall: For identification at this t

The Court: Received and marked for i
tion.

(Record of hearing before a Board
cial Inquiry was marked Government's
"A" for identification.)

Q. (By Mr. Bonsall): What is the
your wife?

The Court: He has already told you, Li

Mr. Bonsall: All right.

Q. (By Mr. Bonsall): I show you a
paper bearing Chinese characters—may
passed to the witness, Your Honor?—and
if you have ever seen that before? A.

Q. Who put those characters on there? [

A. I wrote.

ny of Wong Yem.)
the time of the hearing? You mean the
before the Board of Special Inquiry, of

don't recall which time. There were three
ring.
d you sign this and offer this in evidence
e of the days of the three day hearing?
ow: I object to that question because I
eve it is clear. As I understand it, a thing
was not offered as evidence.
nsall: At the Board of Special Inquiry

ow: It was asked of him to write that
r name down.
nsall: I withdraw the question.
y Mr. Bonsall): You said you did sign
r with the Chinese characters, is that cor-
A. Yes, I wrote it.
here did you sign it?
the hearing.
whom did you deliver this paper?
the time of the hearing. I don't know who

d you hand it to Mr. Norris, the presiding
the hearing?
don't know to whom I gave it. I don't
9]
hat is the English equivalent of these char-
A. I didn't write the English

(Testimony of Wong Yem.)

A. It is my wife's name.

Q. And what is your wife's name in En

A. Lim Shi, or also known as Lim Lee

Mr. Bonsall: I will ask it be recei marked for identification at this time.

The Court: It may be received and ma identification.

(Slip of paper containing the nam witness' wife in Chinese characters wa Government's Exhibit "B" for identi

Q. (By Mr. Bonsall): Did you make a to have Wong Gong here today?

Mr. Chow: I object to that, your Hono

The Court: Objection sustained.

Mr. Bonsall: I have here, your Honor, lish translation of the testimony given by ness before the Board of Special Inquir doesn't speak English, apparently, I was ask the Interpreter to interpret these questi English to Chinese, and the answers from to English, and ask him if he made those and answers. Otherwise it will take quite s to go into [20] each one of these questions swers, and frankly our defense is largely conflicting testimony that was given in thi

Mr. Chow: I object to that, Your Hono ever statement is contained in there, if i tinent to the examination or cross-examin

y of Wong Yem.)
ırt: You mean the testimony of the man
different time?
ow: In an extra judicial hearing. It can
sed for the purpose of impeachment, a
ther than this type. This constitutes a
ovo, and if he should bring in the pro-
r findings of the Court proceedings other
I believe it isn't admissible.
urt: That is one of the most peculiar
f a trial de novo that it has ever been
re to listen to.
ow: If I may ask, I don't understand
se of it. If he was using it for the purpose
ning the witness——
ırt: In a trial de novo, if I am not very
error, the Court reviewed the testimony
previous hearing; and it also takes into
ion the testimony produced at this hear-
hen arrives at its own conclusion based
testimony before the Special Board [21]
y, whatever it may be, and based on its
on and conclusions and the testimony ad-
he trial. That is the law, unless you show
ing to the contrary.
ow: In this particular action the sole
le basis is for determination of citizenship.
urt: I know that. Otherwise you wouldn't

(Testimony of Wong Yem.)

Mr. Chow: This is by Judge Holtzoff in of Mah Ying Og vs. Clark:

"It is clear that the Statute conter trial de novo of the issue of citizenshi merely a review of the administrative

The Court: So far that isn't in conf what I said.

Mr. Chow: "Consequently, the mere fac matter was determined by an administrativ and subsequently in a habeas corpus pr does not bar this suit."

The Court: Right again. Nor am I b these proceedings as they are by the review

Mr. Chow: "The 1940 Statute, howe templates a reopening and a full judicial of the entire issue of citizenship without it merely to [22] a review of the admi action. In a habeas corpus proceeding, t might feel that it would have reached a conclusion than that reached by the admi agency. Nevertheless, it would be constrain firm the action of the administrative agenc were substantial evidence sustaining such a an action for a declaratory judgment u 1940 Code, however, the Court determines issues de novo."

So that the only issue here is relationshi

The Court: That is correct, but how an to determine all the issues de novo unles

y of Wong Yem.)

ırt: Put that in evidence.

ısall: I will offer in evidence at this time nt's Exhibit 1 for identification, being a opy of the official record in connection oard of Inquiry hearing held in December, onnection with the hearing on application entry into the United States.

ow: For the purpose of shortening the gs and expediting it, I will stipulate to the given by the witnesses here, that is, given tness Wong Wing Foo and the witness e examined later, that is by [23] the wit- g Yem and Wong Foo.

ısall: I will ask that the whole certified nt record be introduced.

ırt: If you don't ask for it, I will intro- on my own motion.

ısall: Yes, your Honor, and I have asked

ow: I will stipulate to the testimony, your

ırt: All right.

ow: Because there is testimony of other the record.

ırt: I am going to read it all.

ıereupon certified copy of record of Im- ıtion and Naturalization Service hereto- marked Government's Exhibit "A" for

son's son, Foo's son? Did you ever see M
son? A. No.

Q. You say at different times you se
to China. Did you send any money to your
Mr. Foo? A. I sent it to my wife.

Q. Were you supporting your wife in C

A. Yes.

Q. How many times did you write to
in China?

A. Two or three times a year. Somet
to him at Hong Kong, and then I sent to
in China. [24]

Mr. Bonsall: I have no further cross-
tion with the record in evidence, your Hon

Mr. Chow: That is all.

(Witness excused.)

WONG WING FOO

the plaintiff herein, being first duly sworn
through the Interpreter as follows:

Direct Examination

By Mr. Chow:

Q. Your name is Wong Wing Foo?

A. Yes.

Q. When were you born and where?

A. Chinese Republic, 17th year, fifth m

Q. Where were you born?

ny of Wong Wing Foo.)
n English): About a year.
terpreter: He speaks some.
Through the Interpreter): About a year.
By Mr. Chow): Who are your parents?
e their names?
m She. Wong Yem.
here are they now? A. (Pointing).
urt: Let the record show he is indicating
ss Wong Yem. [25]
By Mr. Chow): Where is your mother
A. In China.
e you married? A. Yes.
ho is your wife? A. Hom Toy Ping.
ave you any children? A. One son.
ho is he and how old? A. In China.
hat is his name and how old is he?
ong Falk. About three or four years of age.
ho are your grandparents, your paternal
ents? A. Wong Shar Loon.
he the father of your father?
s.
hat is the name of your paternal grand-
A. Hom Shi.
here are they now? A. In China.
here do they live in China?
eung Sing Village.
as your father any brothers and sisters?
e has four brothers and no sister.

(Testimony of Wong Wing Foo.)

Q. Who are they and where are they liv

A. Wong Din. That is the elder brothe
Gong, the third brother. The fourth brothe
Sing.

Q. Where are they living now?

A. They all live in San Francisco. W
lived in the country, small town somewhere

Q. Have you ever seen any one of them

A. Yes.

Q. Is Wong Gong married? A.

Q. Who is his wife and has he any chil

A. Hom Shi. Yes, two daughters and or

Q. Is Wong Sing married? A.

Q. Who is his wife and has he any chil

A. Ng Shi. Not when I arrived.

Q. Has Wong Ding—is Wong Ding ma

A. Yes.

Q. Has he any children? A. One

Q. What is the size of your native villag

A. Not very large. Six small houses
large ones.

Q. And where is your house located in
lage?

A. On the second row, the fifth house. [

Q. Can you describe your house? Will y
describe your house?

A. Yes. There are two rooms and then th
a partition with boards. Two kitchens.

Q. Where are you living now?

ny of Wong Wing Foo.)
ing to school.
e you working? A. No.
w are you able to support yourself?
y father supports me.
u mean your father Wong Yem?
s.
w often do you see your father Wong
A. About once a week.
you go to visit him or does he come to
?
times I go to see him and other times
to see me.
u said you were attending school in
? A. Yes.
hat school?
ey have a special class for Chinese.
ow: That is all. Mr. Bonsall? [28]

Cross-Examination

Bonsall:

hat is your mother's name?
m Shi.
hat is your mother's full name?
don't know. She is always known as Lim

show you this document with Chinese char-
d ask you if you have ever seen this before?
s. I don't understand the English part

(Testimony of Wong Wing Foo.)

Q. Where did you write it?

A. At the Immigration Service.

Q. In December, 1948, at the time of y
ing before the Board of Special Inquiry,

A. Somewhere around about that time.

Q. To whom did you deliver it or hand

A. Some of the inspectors.

Q. Did you deliver it to this man
Norris?

A. I can't recognize him. I wouldn't
tell.

Q. What do those Chinese characters r

A. Lim Sun Sun.

Q. Where did you get that name from

A. I found it in the books.

Q. Didn't you tell the officers at the
tion Hearing this was the name of y
mother?

A. Well, they asked me so, so persistent
ing to get somebody's name, so I just wr
something.

Q. Didn't they ask you for your mothe
at the time you wrote this name?

A. Well, they so persistent about ge
mother's name, I told them Lim Shi, and
Chinese I just wrote down some name.

Q. Didn't you tell them at the Board o
Inquiry Hearing at first you didn't kn
mother's name? A. Yes, I did.

y of Wong Wing Foo.)
now it is Lim Shi.
sall: I will ask this document be marked
ication, your Honor—in evidence, rather.
rt: Received and marked.

eet of paper entitled "Name of alleged
mother" and containing Chinese charac-
was admitted into evidence as Govern-
s Exhibit C.)

sall: I will ask this, marked heretofore
fication, be marked in evidence. That is
ent in Chinese in which the father gave
of his wife, and this document in which
es the name of his mother.
rt: So ordered.

cument heretofore marked Government's
it B for [30] identification was admitted
vidence.)

Mr. Bonsall): Do you know if Wong
fied before the Board of Special Inquiry
your case?
w: I object to that.
rt: It is in the record, isn't it?
sall: It is, your Honor. I think, your
h the record in evidence, no further cross-
on.
w: That is our case, your Honor. We
have proved a prima facie case. We have

The Court: All right, I will read the r

Mr. Chow: We will submit it entire
records in evidence, your Honor.

The Court: Matter submitted.

Mr. Chow: At this time, your Honor,
by Mr. Bonsall a couple of days ago he w
Section 17 of the Immigration Act of 19
trolling in that the decision of the Board
Inquiry is final. We are objecting to tha
wish to file authority for that.

The Court: What is it?

Mr. Chow: This is Mah Ying Og vs.
decided on December 8th, 1950, and has
reported yet. I have here a brief filed by th
ment. The Government was appellee in th
They pose this question, if I may read [31]

> "In the opinion of defendant-app
> question presented is: 'Does Section
> Immigration Act of 1917, making th
> of a Board of Special Inquiry on ex
> an alien final, apply to action broug
> Section 503 of the Nationality Act o
> declare an appellant a citizen where
> was born in China of a parent who
> be a native born citizen?' "

That question has been answered in the
Although I haven't the decision, I have he
ping from the Washington Post, I belie
a story about that which states that th

r words, Section 17 does not control Sec-
of the Nationality Act. I also wish to
that Section 904 of Title 8 also permits
03 of Title 8 to be filed by a person who
izenship.

nsall: If the Court please, in this case I
n the liberty of preparing a memorandum
ttention to certain of the testimony at the
Special Inquiry hearing and the facts in
as disclosed upon the testimony this morn-
overing in substance what I believe to be
f the case. I ask leave to file this memo-
nd will furnish counsel with one. [32]

ow: I object to that.

urt: On what grounds?

ow: I will withdraw that; I am sorry.

urt: Do you want to file one?

ow: No, except that he is introducing the
of Wong Gong, who was a witness at the
ceeding. He is introducing his testimony.
in order to have his testimony before the
should produce the witness.

urt: Why didn't you produce him?

ow: In the first place, I have asked the
hether he is available and he is working
y, and——

urt: You have the process of the Court
to you.

ow: I don't want to subject him to loss
your Honor.

Certificate of Reporter

I, Official Reporter and Official Report
certify that the foregoing transcript of
a true and correct transcript of the mat
contained as reported by me and thereaft
to typewriting, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed June 19, 1951. [3

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the Uni
District Court for the Northern District
nia, do hereby certify that the foregoi
companying documents and exhibits, lis
are the originals filed in this Court in
entitled case and that they constitute the
appeal herein as designated by the attorn
appellant:

Complaint for declaratory judgment.
Motion to dismiss.
Affidavit of Lloyd E. Gowen.
Order denying motion to dismiss.
Answer to complaint.
Amended answer to complaint.

ecree.
of appeal.
nd on appeal.
ation of record on appeal.
er's transcript, March 15, 1951.
ant's Exhibit A.
ant's Exhibit B.
ant's Exhibit C.

ness Whereof I have hereunto set my hand
d the seal of said District Court this 21st
ne, 1951.

C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

---

sed]: No. 12986. United States Court of
for the Ninth Circuit. Wong Wing Foo,
, vs. J. Howard McGrath, Attorney Gen-
e United States, Appellee. Transcript of
Appeal from the United States District
r the Northern District of California,
Division.
une 21, 1951.
/s/ PAUL P. O'BRIEN,
the United States Court of Appeals for
inth Circuit.

United States Court of Appeals
For the Ninth Circuit
No. 12986

WONG WING FOO,

Plai

vs.

J. HOWARD McGRATH, Attorney Gene
United States,

Defen

STATEMENT OF POINTS

Plaintiff sets forth the following points
he intends to rely on appeal:

1. The court erred in holding that pla
failed to sustain the burden of establishi
relationship to his father, Wong Yem, b
ponderance of evidence.

2. The court erred in admitting and co
the records and transcripts of the immigra
ceedings other than the transcripts of test
the plaintiff and his father, Wong Yem,
mission of which was stipulated by cou
plaintiff.

CHOW AND SING,

By /s/ W. J. CHOW,
Attorneys for Appell

Court of Appeals and Cause.]

ATION OF RECORD ON APPEAL

Now, the appellant by his attorneys, Chow in the above-named matter, hereby desig- entire record to be included in the tran- ecord on appeal which is being considered for the determination of the points on ntends to rely on appeal.

CHOW AND SING,
By /s/ W. J. CHOW,
Attorneys for Appellant.

of Copy acknowledged.

sed]: Filed June 29, 1951.

No. 12,986

ed States Court of Appeals
For the Ninth Circuit

NG FOO,
Appellant,

RD MCGRATH, Attorney Gen-
the United States,
Appellee.

APPELLANT'S OPENING BRIEF.

CHOW AND SING,
550 Montgomery Street, San Francisco 11, California,
Attorneys for Appellant.

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No. 12,986

ited States Court of Appeals
For the Ninth Circuit

ING FOO,
Appellant,
s.

ARD MCGRATH, Attorney Gen-
f the United States,
Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF THE CASE.

tion in this case was brought in the Court nder Section 503 of the Nationality Act of Stat. 1171; 8 U.S.C.A. 903) for the purpose ishing the citizenship of the appellant. The t, Wong Wing Foo, claims to be a citizen onal of the United States. He claims to have n in China on June 22, 1928. He arrived in ed States at the Port of San Francisco, Cali- n November 22, 1948, and applied before the ion authorities for admission as an Ameri-

that the appellant failed to satisfactorily e
that he is the blood son of Wong Yem and
is not entitled to be admitted to the United S
a citizen thereof. It is conceded by the imm
authorities, however, that appellant's alleged
Wong Yem, is a citizen of the United Stat
decision of said board was appealed to the
sioner of Immigration and Naturalization a
to the Board of Immigration Appeals. The
of the Board of Special Inquiry was affirmed
appellant was ordered excluded from the
States. Thereafter, appellant instituted the
the Court below seeking a judicial declaratio
citizenship. The case came to trial without
The appellant and his alleged father, Wor
were presented as witnesses by the prosecu
establish the father and son relationship. The
offered no evidence or witness other than th
gration records pertaining to the applicatio
appellant for admission before the immigrati
ice. The Court found for the defendant. It
this judgment that the appellant, seeking ev
a declaration of his United States citizens
nationality, prosecutes this appeal.

JURISDICTIONAL STATEMENT.

The Court below had jurisdiction by the r

Nationality Act of 1940 (54 Stat. 1171, A. 903).

Court has appellate jurisdiction pursuant to Law 72, 81st Congress, approved May 24, U.S.C.A. 1291 and 1292).

STATUTES INVOLVED.

lment XIV to the Constitution of the United Section 1, reads:

persons born or naturalized in the United es, and subject to the jurisdiction thereof, citizens of the United States and of the es wherein they reside."

n 1993 of the Revised Statutes of the United Acts of April 14, 1802 and February 10, 1855 amended by Act of May 24, 1934, Section 1), A. 6) reads:

children heretofore born or hereafter born of the limits and jurisdiction of the United es, whose fathers were or may be at the time heir birth citizens thereof, are declared to be ens of the United States; but the rights of enship shall not descend to children whose ers never resided in the United States."

n 503 of the Nationality Act of 1940 (8 U.S.) provides, in so far as pertinent here:

any person who claims a right or privilege

or executive official thereof, upon the grou
he is not a national of the United State
person, regardless of whether he is wit
United States or abroad, may institute a
against the head of such Department or
in the District Court of the United Sta
the District of Columbia or in the distri
of the United States for the district i
such person claims a permanent residenc
judgment declaring him to be a Nationa
United States. * * *"

STATEMENT OF POINTS.

Appellant sets forth the following positio
he intends to rely on appeal:

1. The Court below erred in holding tha
lant has failed to sustain the burden of esta
his relationship to his father, Wong Yem, b
ponderance of evidence.

2. The Court below erred in admitting a
sidering the records and transcripts of the i
tion proceedings other than the transcripts
mony of the plaintiff and his father, Wong Y
admission of which was stipulated by cou
plaintiff.

ARGUMENT.

At the outset we wish to stress the fact

a review of the proceedings had before the States Immigration Service.

Yah Ying Og v. McGrath, 187 F. (2d) 199;
an Seow Tong v. Clark, 83 F. Supp. 482;
hin Wing Dong v. Clark, 76 Fed. Supp. 648;
U. S. v. Clark, 82 Fed. Supp. 412;
hu Leong v. Shaughnessy, 88 Fed. Supp. 91.

evidence and testimony must be produced nd the conduct of the trial is similar to that w trial and as if no former proceedings or s had.

hearing de novo literally means a new hear- or a hearing the second time. (18 C.J. 486.) *h a hearing contemplates an entire trial of controversial matter in the same manner in ch the same was originally heard. It is in no e a review of the hearing previously held, is a complete trial of the controversy, the e as if no previous hearing had ever been .''* (Italics ours.)

ollier & Wallis, Ltd. v. Astor, 9 Cal. (2d) 202, page 205.

n the *Application of Murra,* 166 F. (2d) etition of naturalization was heard in open here the witnesses were examined before the udge Major said:

** * the hearing before the court is not for purpose of reviewing the recommendations he Examiner;* it is a hearing de novo and

ther the testimony heard by the Examir
findings, nor his recommendation are
consequence." (Italics ours.)

All this is in direct opposition to the posi
the judge who, during the instant trial, ruled

"In a trial de novo, if I am not very m
error, *the Court reviewed the testimony t*
a previous hearing; and it also takes into
eration the testimony produced at this h
and then arrives at its own conclusion ba
its own opinion and conclusions and th
mony adduced on the trial. That is the la
less you show me something to the con
(Italics ours.)

Transcript of Record, page 53.

Appellant contends that he is a citizen
national of the United States on the ground
has established a prima facie presumption tha
the son of Wong Yem, an American citizen, t
a preponderance of evidence. The lower Co
its opinion, said appellant has the burden to e
his patrimony by a preponderance of evide
that he has failed to do so. Inferentially, the
lant has made out a prima facie case. It is
recognized fact that no official records of vita
tics are kept in China, which accounts for th
introduction of evidence of birth of the appell
the trial, the appellant and his alleged father
Yem, testified that they are father and son and

Yong Yem is a cook working in Lodi, Cali-
and living at his place of work, and the ap-
is staying in Stockton, California, about 10
part, attending school. They visit and see each
very weekend and the appellant is supported
father. It is because of his father's occupation
fact that there is no adult education program
eign speaking people in Lodi that the appel-
ved to Stockton and is not presently staying
father in Lodi.

cumulative effect of the repeated assertions
d over again by the father that he has a
son, Wong Wing Foo, should create in the
any reasonable man a belief that such a son
Thus we believe the burden of proof imposed
e plaintiff to establish that he is the lawful
on of Wong Yem has been met and that he
le his prima facie case.

ntrast to the affirmative and positive showing
y the appellant, appellee presented no wit-
nd contented himself with the introduction
records and transcript of the immigration
ngs. In the lower Court's opinion, it accepted
ements made before the Immigration Board
ial Inquiry and contained in the records in-
d by the defendant as exhibits to be the collat-
ts in contravention of appellant's claim of
ship of Wong Yem. In this connection the

and Wong Yem testified to the purported
son relationship and defendant introdu
evidence in contravention thereof than t
mony taken before the Immigration Bo
stated in Siu Say v. Nagle, 295 F. 6
cases of this character experience has
strated that the testimony of the partie
terest as to the mere fact of relationshi
be safely accepted or relied upon. R
therefore had to collateral facts for co
tion or the reverse.' The collateral facts
instance are to be found in the transcrip
duced by the defendant."

Transcript of Record, pages 24 and 25

However, the instant case is different from
v. Nagle, supra, which was a habeas corpus
ing whereas the present matter is not a re
administrative action, but is a trial *de novo.*
statements of Wong Yem and the appella
consistent with those contained in the imm
records as given by them and members
family throughout the years. On the questio
effect of the repeated claims and statemen
on various occasions to the Immigration Se
the case of *Johnson v. Ng Ling Fong,* 17 F
11, the Court said:

"The records of the Immigration Dep
concerning the alleged father and his
since 1909 are so complete and the st
as to the number of births of his childr

n any reasonable doubt as to the relationship
he applicant and his alleged father."

n the case of *Louie Po Hok v. Nagle,* 48 Fed.
3, this Court commented:

similar case arose in Ng Yuk Ming v. Til-
hast, 28 Fed. (2d) 547. There, '13 years be-
e * * * the alleged father testified before the
migration authorities that he has a son bear-
the name of the applicant, * * * which he
firmed on every occasion upon which he was
ed to testify.' The decision of the Court was
the decision of the immigration officials was
supported by the evidence."

lso:

ung Yow v. Nagle, 34 Fed. (2d) 848 (C.C.A.
9th).

elieve this case may be resolved upon two
First, has the plaintiff-appellant made out
facie case; and second, if the answer is in
mative, has the defendant-appellee done any-
answer and rebut it?

henever litigation exists somebody must go
with it; the plaintiff is the first to begin; if
does nothing, he fails. If he makes a prima
e case and nothing is done to answer it, the
endant fails."

ones on Evidence, 2d Edition, Sec. 176.

estimony of the appellant and that of his

agreement to matters and facts pertaining to t
ily, its activities, the native village and house,
the association of themselves. They identifi
other correctly. This testimony and showing s
alone should be sufficient to establish the issu
lationship and, if uncontradicted by other e
warrant a verdict or judgment in appellant's f

> "Prima facie evidence is a minimum q
> It is that which is enough to raise a presu
> of fact; or, again, it is that which is su
> when, unrebutted, to establish the fact."
>
> *Otis & Co. v. Securities & Exchange C*
> *sion,* 176 F. (2d) 34.

What evidence or proof then, if any, was
by the appellee to offset and controvert posit
affirmative evidence put forth by appellant?
admitted that no evidence was submitted by
pellee other than the transcripts of the imm
hearings, particularly the testimony of Wong
a part thereof, the introduction of which w
jected to by appellant. The only justification
thority, if any, that such transcripts of rec
the immigration hearings could be admitted
be under Section 1733 of Title 8, U.S.C.A. whi
vides, "(a) Books or records of accounts or
of proceedings of any department or agency
United States shall be admissible to prove
transaction or occurrence as a memorandum o

pts of testimony taken in the proceedings be-
Board of Special Inquiry. They also contain
sions of the Commissioner of Immigration
uralization Service and the Board of Immi-
Appeals dismissing the appeal of the appel-
m the adverse decision of the Board of Spe-
uiry denying that appellant is the son of
em and therefore not a citizen of the United
We do not believe these transcripts of testi-
r the decisions of the higher immigration
ies come within the purview of any statute,
deral or other, providing for their admission
nce in a judicial trial. Section 1733(a) of
U.S.C.A. clearly means that only minutes of
nigration proceedings shall be admitted to
ie act as a memorandum of which the pro-
were made, and thus, the transcript of testi-
uld only be admitted to show or prove the
from which the testimony was adduced as
nda that the proceedings before the Board of
Inquiry were held. Any paper, record or
t so offered is not admissible to prove the
ich it recites. This view was taken by the
United States v. Aluminum Co. of America,
71 when it held:

It is true that the document presently offered
ot admissible to prove the facts which it re-
s. That proposition is sustained by Watkins
Iolman, 16 Pet. 25, at page 56, 10 L. Ed 873,

Co., 274 U.S. 693 at page 703, 47 S. Ct
L. Ed 1302 * * *"

Also *Moran v. Pittsburgh-Des Moin*
Co., 86 Fed. Supp. 255.

In the case of *United States v. Internatio*
vester Co., supra, where the Government s
introduce as evidence a report of the Feder
Commission consisting of statements, testim
other documentary exhibits, the Court, in
such evidence as inadmissible, said:

"In support of its alternative content
competitive conditions have not been es
bringing about a situation in harmony v
the Government relies in large measu
various statements and tabulations cont
the report of the Federal Trade Con
which was introduced in evidence over
jection of the International Company.
entirely plain that to treat the statement
report—based upon an ex parte investiga
formulated in the manner hereinabove se
as constituting in themselves substan
dence upon the questions of fact here
violates the fundamental rules of evid
titling the parties to a trial of issues of
upon hearsay, but upon the testimony of
having first-hand knowledge of the facts,
produced as witnesses and are subject to
of cross-examination * * *"

ngs we quote the appropriate words of Sec- of 20 American Jurisprudence at page 578 579:

e mere fact that testimony has been given in course of a former proceedings between the es to a case on trial is no ground for its ad- ion in evidence. The witness himself, if able, must be produced the same as if he testifying de novo. His testimony given at rmer trial is mere hearsay. This rule applies stimony given by all witnesses at the former whether they were expert or lay witnesses."

E. Yarbrough Turpentine Co. v. Taylor, 201 Ala. 434, 78 So. 812, citing R.C.L.;

vannah, F. & W. R. Co. v. Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183;

Joseph v. Union R. Co., 116 Mo. 636, 22 S.W. 794, 38 Am. St. Rep. 626;

w York C. R. Co. v. Stevens, 126 Ohio St. 395, 185 N. E. 542, 87 A.L.R. 884;

dden v. Duluth & I. R. R. Co., 112 Minn. 303, 127 N.W. 1052, 21 Ann. Cas. 805.

el that if the defendant wanted to rely so upon the alleged uncle's statements, he roduce him as a witness instead of depend- his extrajudicial testimony. In the case of *States v. Campanaro,* 63 F. Supp. 811, the d:

is elementary in our system of law that the

Therefore, evidence which does not de
value solely from the credibility of the
but rests also on the veracity of another
is termed 'hearsay' and is ordinarily i
sible. *Hopt. v. People of Territory of U*
U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262. The
such evidence is that the other perso
whose credibility the jury must rely is n
ent in court and cannot be subjected t
examination. However, not every oral
ten extrajudicial statement offered in
comes within the hearsay rule. It is onl
the extrajudicial statement is offered t
lish the truth of the fact so stated that t
say rule can apply. Where the extra
statement is offered without reference
truth of the matter extrajudicially asser
merely to prove that the oral statement,
was made or that a written statement,
exists, then the evidence is without the
rule."

The Court continued:

"It should be noted that there is statu
thority for permitting the government
the same facts by offering in evidence a
the government records under the seal
department. This statute merely codifies
mon-law exception to the hearsay rule, tha
the person whose statement is offered is
able for adequate reason and where ther
cumstantial probability of the truthfulnes

1420 et seq.; Demeter v. United States, 62
). D.C. 208, 66 F. 2d 188; United States v.
scoat, 4 Cir., 4 F. 2d 193. However, even this
ute does not permit the contents of govern-
t records to be proved by parol testimony as
here done. Nock v. United States, 2 Ct. Cl.
"

lso:

nited States v. Packard Sedan, 23 F. 2d 865.

e situation as the instant case arose in *Lee United States,* 49 F. (2d) 24. In that case the ent sought to overcome the prima facie case ppellant by the introduction of certain im- n records. The lower Court held for the gov- and ruled that such records were admissible. , the Appellate Court reversed the judgment,

thus appears that the court unconsciously wed the erroneously admitted record to in- nce him in the consideration of the case. This striking illustration of the danger of getting the record evidence not admissible under -recognized rules. If these records were con- ing in the decision of the case, it would seem the defendant should be discharged from ody. In judicial proceedings the court is re- ted in the reception of evidence to only such neets the requirements of legal proof."

ew of the well-established principles of evi-

tions the entire immigration records as evi
answer the prima facie case established by a
His opinion shows that his decision as to th
lant's claim was predicated principally upon
tents and statements in the transcripts of te
particularly the testimony of an uncle name
Gong, who made contradictory statements in
migration hearings, corroborating and then
dicting his meeting with the appellant in Hor
This uncle has shown himself in that proce
be untrustworthy in his statements and henc
lant rightfully refused to call him as a
Falsus in uno, falsus in omnibus. If the app
cides to rely upon the testimony of Wong Go
it is elementary that he should be called by
by the appellant, as suggested by the trial ju
page 63 of Transcript of Record.

> "In order to establish a right to i
> testimony of a witness given at a former
> is incumbent upon the proponent of s
> dence to lay a proper predicate for its i
> tion by showing the unavailability of the
> who gave the testimony sought to be p
> In other words, the burden of satisfying
> of the validity of the excuse for non-pr
> of witness lies upon the party seeking
> duce the testimony given by him at the
> trial. It must be shown either that the
> is dead, insane, or beyond the jurisdictio
> court or on diligent inquiry cannot be

ner trial cannot be produced as witness on the
ond trial. In the absence of proof of some
h circumstance, testimony of this character
be rejected."
0 Am. Jur. Sec. 698 at page 587.

CONCLUSION.

ubmit, briefly and simply, that the proceeding
he trial Court was in the nature of a new
examine the facts and testimony for a judi-
ermination of the issue, "Is the appellant the
Wong Yem, a citizen and national of the
States, and therefore a citizen and national
Jnited States?" It was not a hearing to re-
e administrative proceedings had before the
ation Service and the evidence, findings and
ons adduced and developed therein. The ap-
ubmitted the entire immigration records as
evidence to rebut the presumption created
appellant. However, from authorities cited,
scripts of testimony and the opinions which
art of the immigration files are inadmissible
ompetent evidence, and therefore could not
uld not be used to rebut and contravene the
blished by the appellant. Without the unre-
nd unstrustworthy statements of the alleged
Jong Gong, what then has the appellee offered,

petent evidence was offered by the appellee
cordingly, the appellant has established his
a preponderance of evidence.

It is, therefore, respectfully asked that t
ment for the defendant awarded by the Cou
be reversed, and that appellant be declared
and national of the United States.

Dated, San Francisco, California,
September 12, 1951.

Respectfully submitted,
CHOW AND SING,
Attorneys for App

No. 12,986

ed States Court of Appeals

For the Ninth Circuit

NG FOO,

Appellant,

RD MCGRATH, Attorney Gen-
he United States,

Appellee.

BRIEF FOR APPELLEE.

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INE,

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official records and transcript of the administra-
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No. 12,986

ited States Court of Appeals
For the Ninth Circuit

ING FOO,
Appellant,
s.
ARD MCGRATH, Attorney Gen-
f the United States,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

ppellant filed an action, pursuant to Section
ne Nationality Act of 1940 (54 Stat. 1171; 8
903), in the Court below seeking a declara-
gment that he is a national and citizen of the
States.

ant arrived at the Port of San Francisco, Cal-
on November 22, 1948 and applied for admis-
he foreign born son of an American citizen.
detained by the Immigration and Naturali-
ervice and accorded a hearing before a Board
al Inquiry convened pursuant to 8 U.S.C.

Wong Yem, and he was excluded as an alie
possession of a valid immigration visa. The
of the Board of Special Inquiry was upheld
Commissioner of the Immigration and Natur
Service and subsequently affirmed by the B
Immigration Appeals. The appellant then
complaint in the Court below seeking a ju
declaring him to be a national and citizen
United States.

In the course of the trial, the certified recor
proceedings before the Immigration and Na
tion Service was introduced into evidence
objections of counsel for appellant. The lowe
found for the defendant and from that judgm
appellant now prosecutes this appeal.

ARGUMENT.

Appellant set forth the following points upo
he intends to rely:

1. The Court below erred in holding
pellant has failed to sustain the bu
establishing his relationship to his
Wong Yem, by a preponderance of evi

2. The Court below erred in admitting
sidering the records and transcripts
immigration proceedings other than t
scripts of testimony of the plaintiff

I.

ICIAL RECORDS AND TRANSCRIPT OF THE ADMINIS-IVE PROCEEDINGS RELATIVE TO APPELLANT ARE SSIBLE IN EVIDENCE.

ppellant in his brief first considered the sec-nt upon which he relies, that is "whether the and transcript of the immigration proceedings nissible in evidence."

lant emphasizes that 8 U.S.C. 903 (Sec. 503, ity Act of 1940) contemplates a trial *de novo,* assumes that such a trial precludes the trial om considering evidence presented at the ad-tive hearing.

ppellee agrees that 8 U.S.C. 903 contemplates *e novo,* but disagrees as to the meaning and tation of the term. It is believed that the le Judge Murphy correctly held, that in an ch as this, the Court should not only consider evidence produced at the trial, but should also he record prepared during the administrative ngs.

l, pursuant to the provisions of 8 U.S.C. 903, ion in equity to be tried without a jury, be-udge of a United States District Court. In e of proceedings the "Hearsay Rule" is re-31 *C.J.S.* Para. 210, page 945.)

the admission and review of evidence in an ty case, the Court possesses a broad discretion is very liberal in the admission of evidence on

nent to the issues will be considered. Para. 478, 47 Fed. (2d) 621, 640.)"

When the Board of Special Inquiry found pellant was not the blood son of Wong Yem, in substance that *appellant was attempting to illegally enter the United States.*

The Courts of the United States have recog ability of the Immigration and Naturalizatior to ferret out fraudulent claims to United S tionality. This view was expressed by the States Supreme Court in *Tulsides v. Insular C* 262 U.S. 258, at 265, wherein the Court state lows:

"* * * leave the administration of the la the law intends it should be left; to the a of officers made alert to attempts at of it and instructed by experience of the tion which will be made to accomplish eva

The present action is a suit in equity with torical requirement that he who seeks equitab must come into Court with clean hands. This able Court in the case of *Hyland v. Millers* Fed. (2d) 1003, affirmed 91 Fed. (2d) 735, re denied 92 Fed. (2d) 462, certiorari denied 3 645, stated:

"In a case involving fraud, the Court has latitude in admitting evidence in every stance relative to the condition and relatio parties and subject matter and every

Jnited States Supreme Court, in discussing an nvolving fraud, stated in the case of *Castle Bullard,* 64 U.S. 172, 187:

here fraud is of the essence of the charge, essarily give rise to a wide range of investi- on, for the reason that the intent of the de- dant is, more or less, involved in the issue. perience shows that positive proof of fraudu- acts is not generally to be expected, and for reason, among others, the law allows a re- to circumstances, as the means of ascertain- the truth. Great latitude, says Mr. Starkie, ustly allowed by the law to the reception of rect or circumstantial evidence, the aid of eh is constantly required, not merely for the pose of remedying the want of direct evi- ce, but of supplying an invaluable protection nst imposition." (1 *Stark, Ev.* p. 58.)

many years this Honorable Court has recog- at false claims to U. S. citizenship have been l by persons seeking to illegally enter the States. In the case of *Siu Say v. Nagle,* 295 5, when considering a Chinese relationship s Honorable Court stated:

cases of this character experience has dem- rated that testimony of the parties in inter- as to the mere fact of relationship can not afely accepted or relied upon."

norable Court then quoted from the *San- Trinidad,* 7 Wheat. 283-337 (5 L. Ed. 454):

as in relation to the country of his birt
ing in a vessel on a particular voyage
ing in a particular place, if the fact t
otherwise it is extremely difficult to exe
from the charge of deliberate falseho
courts of justice, under such circumsta
bound, upon principles of law, and mor
justice, to apply the maxim '*falsus in u
in omnibus.*'" (Italics ours.)

The appellant has cited the case of *Gan See* 83 Fed. Supp. 482, in support of his argum the immigration records should not have been into evidence. Although the above case held under 8 U.S.C. 903 to be a trial *de novo,* th did consider the immigration records as indi page 486:

"There was put in evidence the vario scripts of the proceedings had before the mental officers and agencies."

Thus the Court considered the records subm the government, along with the testimony giv trial, and then found that the plaintiff had sustain his burden of proof. The Court's att also invited to footnote 3 on page 485 in t cited case:

"There has just come to hand the op George Holtzoff of the District of Colu *Mah Ying Og v. Clark et al.,* D.C. 81 Fe 696, 697, where the Court held and pro that Sec. 503 'contemplates a trial de

e noted that the Court did not find, in the case *Ying Og v. Clark,* supra, that the records of inistrative hearing were inadmissible. The le Judge Holtzoff stated at page 697:

e 1940 statute, however, contemplates a *re-ing* and a full judicial hearing of the entire of citizenship without confining it *merely* to view of the administrative action." (Italics lied.)

nguage used by the Honorable Judge Holtzoff that in his opinion an action under 8 U.S.C. porates not only new evidence taken at the he trial, but also the *reopening* and *review* ntire administrative procedure. The Court nen, as was stated by the Honorable Judge in the case at bar, arrive at its own con-fter taking into consideration all the evidence.

gh the specific question as to the admissibility mmigration records into evidence under the s of 8 U.S.C. 903 has not been previously de-ner authorities indicate the record of an ad-ive hearing should be admitted into evidence. kman's Compensation Act provides by statute aring *de novo.* In the case of *Worn v. Ana-opper Mine Co.,* 43 P. (2d) 663, 667, the Court of Montana interpreted that statute ng *Dosen v. East Butte Copper Mine Co.,* 0 as follows:

e term 'de novo' as used in the statute, is

emphasize the fact that after all the statu
meant, *that all the evidence taken by th
and all of the additional evidence take
Ct. should be considered together and th
that evidence as a whole, the Ct. should
judgment.*" (Italics ours.)

The United States Code provides ample a
for the introduction into evidence of the imn
records objected to by appellant's counsel. 28
Sec. 1732 reads as follows:

"RECORD MADE IN REGULAR C
OF BUSINESS.

In any court of the United States an
court established by Act of Congress, a
ing or record, whether in the form of
in a book or otherwise, made as a mem
or record of any act, transaction, occur
event, shall be admissible as evidence of
transaction, occurrence, or event, if mad
ular course of any business, and if it
regular course of such business to ma
memorandum or record at the time of
transaction, occurrence, or event or
reasonable time thereafter.

All other circumstances of the making
writing or record, including lack of
knowledge by the entrant or maker, may
to affect its weight, but such circumstan
not affect its admissibility.

The term 'business', as used in this sec
cludes business, profession, occupations

Courts, in considering the above section, in-
he functions of government agencies within
ition of the term "business".
lein v. United States, 8 Cir. 1949, 176 F. (2d)
184. Cert. den. 1949, 338 U.S. 870, 70 S. Ct.
145 (voting lists);
nited States v. Ward, 2 Cir. 1949, 173 F. (2d)
628 (Selective Service record);
orwood v. Great American Indemnity Co., 3
Cir. 1944, 146 F. (2d) 797 (Navy service rec-
ord);
llack v. Metropolitan Life Insurance Co., 3
Cir. 1943, 138 F. (2d) 123 (birth certificate);
unter v. Derby Foods, Inc., 2 Cir. 1940, 110
F. (2d) 970, 133 A.L.R. 255 (coroner's death
certificate).

ourt, in the case of *Moran v. Pittsburgh-Des*
Steel Co., 86 F. Supp. 255, on pages 279-280,
follows:

) The purpose of the exception of the hear-
rule, as I read the authorities, where refer-
is made to reports formulated by an agency
ne government by virtue of a congressional
ority is to make possible the presentment of
or circumstances which appear in that re-
where it is necessary to rely on what is
ne report in order to avoid a miscarriage of
ce.

* * * * * *

Public records compiled in the regular

tion on the grounds that the inquisitio
quiry was in the nature of a judicial
ing wherein the right of cross examina
amply safeguarded and protected. * * *"

The United States Court of Appeals, 3rd
when considering the above case, stated as
on page 473 of 183 F. (2d) 467:

"The report is no less admissible becaus
tains conclusions of experts which are ba
hearsay evidence as well as upon obs
These circumstances, by virtue of expre
tory provision, go to weight rather tha
missibility."

The United States Court of Appeals for
Circuit stated in the case of *Klein v. Unite*
cited supra, on pages 187-188, as follows in
to voting records:

"Being public records made contempor
with the event which they reflect, they
sumptively correct and are 'writing o
* * * made as a memorandum or recor
act', within the meaning of Title 28 U.
695 (now 28 U.S.C.A. Sec. 1732); H
United States, 8 Cir., 143 F. (2d) 795;
v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 8
645, 144 A.L.R. 719. The argument of co
defendants goes to the effect or weight o
dence rather than to its admissibility."

Section 1733 of Title 28 U.S.C.A. is also a
and reads as follows:

c. 1733. GOVERNMENT RECORDS AND PAPERS; COPIES.

.) Books or records of account or minutes of department or agency of the United States l be admissible to prove the act, transaction or rrence as a memorandum of which the same e made or kept.

) Properly authenticated copies or tran-ots of any books, records, papers or documents ny department or agency of the United States be admitted in evidence equally with the nals thereof. June 25, 1948, c. 646, 62 Stat. '

lying the above statute to the case at bar, the of the Immigration Service are admissible to t the Board of Special Inquiry was held. In the transcript of the proceedings are pre- be correct. As to this latter point, counsel appellant has not challenged the correctness uthenticity of the documents offered in evi-

ant has cited as authority *United States v. uro,* 63 F. Supp. 811, and as quoted by the on page 14 of his brief, the Court stated:

wever, not every oral or written extra judi- statement offered in evidence comes within hearsay rule. It is only where the extra ju- l statement is offered to establish the truth he fact so stated that the hearsay rule can y. *Where the extra judicial statement is of-*

that the oral statement, in fact, was mad
written statement, in fact, exists, then the
is without the hearsay rule." (Italics ou

The immigration records were not intro
prove the truth of the words spoken. In
record is so interwoven with discrepancies
becomes obvious many of the statements c
reconciled. It therefore follows that the
transcript was offered in evidence not to p
truth of the word spoken, but to establish t
oral statements were made.

The portion of the administrative record
the appellant specifically objected was the t
of his alleged uncle, Wong Gong. During th
of the administrative hearing, the appellant
Wong Gong as a witness in his own behalf. T
ing conducted by the Board of Special Inqu
semi-judicial in nature. The parties in interes
the Board of Special Inquiry were the same a
before the Court below. The appellant was rep
by the same counsel who now brings this app
there was opportunity for cross-examinatio
witness. As a practical matter, the appellant
records of the Board of Special Inquiry would
duced at the trial. Counsel for the appellant
to the Court's considering Wong Gong's te
given at the Board hearing. The following q
and answers appear on page 63 in the trans
record:

he other proceeding. He is introducing his
mony. I believe in order to have his testimony
re the Court he should produce the witness.
he Court. Why don't you produce him?
r. Chow. In the first place, I have asked the
ess whether he is available and he is working
he city, and——
he Court. You have the process of the court
lable to you.
r. Chow. I don't want to subject him to loss
ages, your Honor.
he Court. All right."

e above testimony, it appears that the only
dvanced by the appellant for the non-produc-
Wong Gong, was that it might subject him to
ages.

ppellant alleges that the defendant below had
of presenting Wong Gong as a witness. Such
not consistent with the facts. The appellant
hat he is the nephew of Wong Gong, and
allegations that he could not have produced
he time of the trial. In fact, from the state-
Mr. Chow, supra, it appears that Wong
s available as a witness. Under such cir-
es, a strong presumption arises that had
ong been called as a witness, his testimony
ve been adverse to the appellant.

onorable Judge Murphy, relative to the ap-
of Wong Gong as a witness, stated in his

"* * * Testimony of the alleged uncle
in that he was the only witness presente
plaintiff who could establish a link of
between the adult now seeking admissior
six year old boy that Wong Yem purport
left in China. His refusal to identify Wo
Foo and his denial of plaintiff's testim
given great weight by the Immigration
ment. Plaintiff knew this. He could n
seeing the shadow it threw over his cla
significantly, he made no effort to brir
Gong before this tribunal. He charge
brief that Wong Gong lied—yet he wa
not to put the lie to him before this cou
an omission hardly accords with plaintif
ent protestations of forthrightness."

Should one party fail to produce an esse
ness, where he has the power to do so, a str
sumption arises that if the witness was prod
testimony would be against him. In the case
v. Venetian Blind Corporation, et al., 21 F
913, affirmed 111 F. (2d) 455, the Court stat

"and applying the familiar rule that wh
is material testimony to establish a fact
in the present ability of the litigant to pre
(he) fails to do so, or offers a reasonable e
such failure, *the presumption follows tha
timony, if presented, would be against su*
Mammoth Oil Company v. United Sta
U.S. 13, 48 S. Ct. 1, 72 L. Ed. 137." (Itali

The United States Supreme Court in *A*

Familiar rules govern the consideration of ence. As said by Lord Mansfield in *Blatch v. her* (Cowper 63-65): 'It is certainly a maxim all evidence is to be weighed according to proof which it was in the power of one side ave produced, and in the power of the other ave contradicted.' " (page 51.)

ge 52, quoted *Commonwealth v. Webster,* 5 5, 316:

But when pretty stringent proof of circum-ces is produced, tending to support the ge, and it is apparent that the accused is so ted that he could offer evidence of all the and circumstances as they existed, and show, ch was the truth, that the suspicious circum-ces can be accounted for consistently with his cence, and he fails to offer such proof, the ral conclusion is that the proof, if produced, ad of rebutting would tend to sustain the ge."

ellant is not in a position to complain that ess, Wong Gong, was not produced, when it in his power to do so.

icago M. St. P. & P. R. Co. v. Slowik, 184 F. (2d) 920.

urt's attention is invited to the untenable po-which the government would be placed, should allowed to introduce into evidence the rec-ts administrative hearings. The Court may cial notice that there are few, if any, public

Government has evolved a system of recor
genealogy of Chinese claimants to United S
tionality. These records constitute the best
available, and are in most instances the or
mentary evidence, to assist the Courts or
trative agency, in determining the veracity
to United States nationality, made by perso
Mongolian race.

In practice, the records of the family his
superior to the testimony of the parties in
and in effect constitute the best evidence.
may be seen that the appellee when defend
type of action, has nothing on which to rely
the record and transcript of the administrat
ceedings.

II.

IT WAS INCUMBENT UPON APPELLANT TO ESTA CLEAR AND CONVINCING EVIDENCE HIS C UNITED STATES NATIONALITY.

The appellant's first point asserts that the
low erred in holding that appellant had faile
tain the burden of establishing his relationsh
father, Wong Yem, by a preponderance of
The appellant contends that if the immigrat
ords were not admissible in evidence, then
made out a *prima facie* claim to United St

ppellee asserts that the immigration records
nissible in evidence, and therefore the Court
roperly found that appellant had failed to
he burden of establishing his relationship to
em. The appellee further contends that a
ima facie showing is insufficient to estab-
s United States nationality.

erson arriving at a port in the United States
ks to enter as a citizen and national must
he burden of proof in establishing his na-
The burden rests on a Chinese applicant for
n to the United States to prove that he is the
American citizen.

ynn ex rel. Yee Suey v. Ward, 104 F. (2d)
900;

un Kock Quon v. Proctor, 92 F. (2d) 326;

ng Yen Loy v. Cahill, 81 F. (2d) 809;

ong Choy v. Haff, 83 F. (2d) 983;

on Ying Loon v. Carr, 108 F. (2d) 91.

s a natural presumption that a person of the
ace is an alien and not a citizen of the United
n the case of *Ex parte Lung Wing Wun,* 161
212, 213 (habeas corpus action involving the
Chinese person to return to the United States
visit to China—hearing on the merits), the
ted:

re is a natural presumption that a person
e Mongolian race coming to this country from
a, is an alien, and to overcome that presump-

convincing evidence is essential, becaus
proceeding or inquiry having for its o
lawful determination of questions aff
claim to citizenship asserted by such a
he is himself an exhibit, his language,
and physical appearance must be consi
evidence tending to prove his alienage, a
out evidence sufficient to create a belief
a person is, notwithstanding his alien p
a citizen by birth, *the natural presumptio
into a legal conclusion.*" (Italics ours.)

In the case of *Lee Sim v. United States,* 21
435, the Circuit Court of Appeals, 2d Circui
stated:

"In these deportation proceedings th
natural presumption that a person of
golian race is an alien and it is essential
*evidence to overcome it and to show that
is entitled to the privileges of citizensh
United States should be clear and con*
(Italics ours.)

In the case of *Ex parte Chin Him, et al.,* 22
133, the District Court of New York (1915) s

"and finally, as was held in Lee Sim v
States, supra, there is in a proceeding to
person of the Mongolian race, *a natural
tion that he is an alien, which can only
thrown by clear and convincing c*
(Italics ours.)

As stated, supra, in *Siu Sau v. Nagle,* ex

as to the mere fact of relationship cannot be
cepted or relied upon. This principle is also
d by Justice Field of the Supreme Court of
ed States, when writing the opinion of the
the case of *Quock Ting v. United States,* 140

the authorities cited, supra, it is well estab-
at a person applying for admission into the
tates as a foreign born citizen must estab-
citizenship by *clear and convincing evidence.*
requires more than a mere *prima facie* show-
he person is a citizen of the United States.

tions were issued pursuant to the statute
ich the present action was filed. Sec. 112.2
R. deals with persons arriving in the United
r the purpose of prosecuting, before the
eir claim to United States nationality. The
n follows the presumption that all such per-
ying for admission to the United States are
to be aliens and not citizens of this country.

CONCLUSION.

pellee respectfully submits that 8 U.S.C.A.
503 of the Nationality Act of 1940), con-
a trial *de novo* in which the Court, sitting
t of equity, should consider all the evidence,
both a review of the administrative pro-

trial. The Court should then arrive at its
clusion based on all the evidence before the

It is well known that fraud abounds in rel
cases. The finding by an Administrative B
the claimed relationship does not exist rais
ference of fraud. To exclude the testimony
the Administrative Hearing would place
judge in a very precarious position. He
forced to make a decision with only a porti
evidence before him. Such a procedure cou
in the lower Court declaring alien imposte
citizens of the United States.

United States nationality is a prized posses
it is impossible to compute its value in
terms. Men have for years committed all m
crimes in an effort to be recognized as citize
United States. The Courts in the years p
taken cognizance of the many and varied att
establish, through fraud, false claims to
nationality. As a natural result, a person o
birth, arriving for the first time in the Unite
has been required by the Courts to prove
and convincing evidence that he is, in fact, a
this country. Such a requirement is proper
consider that the United States is a sovereig
with the inherent power and obligation to p
people and property from aliens of other lan
submitted that the judge in the Court below
stated the law when requiring the appellant

a preponderance of evidence, that he is a
the United States.

therefore, respectfully requested that the
for the defendant awarded by the Court
affirmed.

San Francisco, California,
October 10, 1951.

CHAUNCEY TRAMUTOLO,
United States Attorney,
EDGAR R. BONSALL,
Assistant United States Attorney,
Attorneys for Appellee.

RGREAVES,
VINE,
e Brief.

No. 12,986

ed States Court of Appeals

For the Ninth Circuit

ING FOO,

Appellant,

RD MCGRATH, Attorney General
United States,

Appellee.

REPLY BRIEF FOR APPELLANT.

CHOW AND SING,
550 Montgomery Street, San Francisco 11, California,
Attorneys for Appellant.

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vidence (2d Edition), Section 176 5

No. 12,986

ted States Court of Appeals
For the Ninth Circuit

ING FOO,
Appellant,

.

RD MCGRATH, Attorney General
United States,
Appellee.

REPLY BRIEF FOR APPELLANT.

---

opening brief, we stressed the fact that a
ng instituted in the United States District
nder Section 503 of the Nationality Act of
Stat. 1171; 8 U.S.C.A. 903) contemplates a
ovo and not a review of the proceedings had
ne United States Immigration Service. Ap-
his brief, agrees and concedes that such an
a trial *de novo* but disagrees as to the mean-
interpretation of the term "de novo." He
nat question as to the admissibility of the
ion records into evidence in a case of this

(2d) 663, a Montana case, as his authority
record of an administrative hearing should
mitted into evidence. This particular case c
appeal to the county district court of an
decision by the Industrial Accident Board as
by the Workman's Compensation Act of M
The case is not analogous to the situation in
ent case. It was an appeal where the eviden
mony and records taken before the Industri
dent Board were before the Court for consi
and the Court allowed additional testimony to
duced. Moreover, the language of the Cour
cited case clearly explains that the use of t
"de novo" in the statute is different than it
ally meant. The judge said,

> "While it is true there may be some con
> the statute by the inclusion of the term '
> that confusion has been explained by th
> In Dosen v. East Butte Copper Mining
> Mont. 579, 254 P. 880, the court explai
> the term 'de novo', as used in the st
> not synonymous with the familiar tria
> takes place in a district court on appea
> justice's court."

Appellee brought forth the words of the H
Judge Holtzoff in *Mah Ying Og v. Clark,*
Supp. 696, as indicating that an action under
503 of the Nationality Act incorporates not
evidence taken at the time of the trial, but
reopening and review of the entire admin

ion to the opinion of the learned jurist who

'he 1940 statute, however, contemplates a re-
ing and a full judicial hearing of the entire
of citizenship without confirming it merely
review of the administrative action. In a
as corpus proceeding, the Court might feel
it would have reached a different conclusion
that reached by the administrative agency.
rtheless, it would be constrained to affirm
action of the administrative agency if there
substantial evidence sustaining such action.
n action for a declaratory judgment under
940 Code, however, the Court determines all
e issues de novo." (Italics ours.)

plainly seen that the Court there was differ-
between a habeas corpus proceeding where
t merely reviews the administrative action
oceeding under Section 503 of the Nation-
where the Court determines *all of the issues*
This view was further reiterated by the
Appeals in 187 F. (2d) 199, page 201, when
vas brought to it for consideration.

case of *Pittsburgh S. S. Co. v. Brown,* 171
175, the Court clearly supports this view in

n our view, it is hardly open to question
hat the court below correctly held that plain-
vas entitled to a trial de novo on the issue
nted by its complaint for injunction, and
a trial contemplates what the term implies

the hearing of evidence, as though no action had been taken. Spano v. Weste Growers, Inc., 10 Cir., 83 F.2d 150, 152 Luebeck, 377 Ill. 50, 35 N.E.2d 334, 339 v. Young, Court of Appeals of Ohio, 77 C 20, 65 N.E.2d 399. In the last cited case on page 406 of 65 N.E.2d, stated:

> *'A trial de novo connotes an exami testimony and an independent finding fully as though the action was origina tuted in that court, in which event it immaterial what errors were committ hearing before the board. Also it wou material what the findings of the boar*

Thus, we have no difficulty in conclu the court properly refused to receive script of testimony taken before the Dep missioner on the particular issue involved the court's opinion in the Crowell case supports such a conclusion. The court 64 of 285 U.S., page 297 of 52 S. Ct., s

> 'We think that the essential inde of the exercise of the judicial powe United States in the enforcement o tutional rights requires that the fede should determine such an issue upon record and the facts elicited befo (Italics ours.)

We again restate our position set forth in ing brief that if the appellee decides to rely testimony of Wong Gong, then he should be him to testify in Court and not to rely upon

in appellee's power to produce him if he so particularly if appellee felt the testimony Gong would help to answer appellant's case.

ee contends that a mere *prima facie* showing ient to establish one's United States nation- failed to distinguish the present judicial ac- n an administrative proceeding as one held nited States Immigration Service. All the d by appellee on this phase of his brief were rpus proceedings and not judicial trials. The ype of action is a judicial litigation where two parties, the proponent and the opponent. nentary that if the proponent makes out a *ie* case, not one of moral certainty or beyond ble doubt, but sufficient to support his allega- n the burden shifts to the opponent or defend- swer it. If he does nothing about it, he fails roponent succeeds.

Whenever litigation exists somebody must go ith it; the plaintiff is the first to begin; if he nothing, he fails. If he makes a prima facie and nothing is done to answer it, the defend- ails."

nes on Evidence (2d Edition), Section 176.

pellee indulges in the false premise that when d of Special Inquiry found that appellant is lood son of his father, Wong Yem, it found nce that appellant was attempting by fraud y enter the United States. We see nothing to

of fraud in the pleadings and answer. In
findings of facts and conclusions of law of t
of Special Inquiry did not mention fraud as
for its adverse decision.

We do not wish to burden the honorable C
repetition of our arguments embodied in the
brief. We believe the arguments and author
mitted in that brief aptly cover our posi
answer appellee's contentions.

Wherefore, appellant prays that the jud
the District Court be reversed and that app
adjudged a citizen and national of the Unite

Dated, San Francisco, California,
October 22, 1951.

Respectfully submitted,
CHOW AND SING,
Attorneys for Appel

No. 12,986

IN THE

ted States Court of Appeals

For the Ninth Circuit

ING FOO,

Appellant,

.

ARD MCGRATH, Attorney Gen-
f the United States,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

CHAUNCEY TRAMUTOLO,
United States Attorney,
CHARLES ELMER COLLETT,
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Assistant United States Attorney,
422 Post Office Building, San Francisco 1, California,
Attorneys for Appellee and Petitioner.

ED

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ıtement 1

al De Novo'' is not a term having one invariable
ıing. Where, as here, it relates to the judicial re-
of an issue already heard in an administrative pro-
ng involving the same parties, before a tribunal
ɔrized by law to determine that issue, the term
ies the re-examination and re-evaluation of the
ence adduced at the prior proceeding, together
a consideration of whatever new and additional
ence is offered at the de novo hearing..... 2

apparent that Congress never intended by Sec-
503 of the Nationality Act, to provide for the
ial trial de novo of a claim to citizenship as-
d thereunder, without regard for facts proved at
executive proceedings lawfully held to determine
very issue 7

llant's authorities do not support his position
upon a judicial trial de novo of an issue deter-
d in a prior proceeding between the same parties,
certified record of that prior proceeding is inad-
ible as evidence to be considered by the court at
le novo hearing 10

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.....1, 2, 3, 6, 8, 9, 1

Texts

No. 12,986

IN THE

ted States Court of Appeals

For the Ninth Circuit

ING FOO,
Appellant,

ARD MCGRATH, Attorney Gen-
the United States,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

---

onorable William Denman, Chief Judge, and e Honorable Associate Judges of the United s Court of Appeals for the Ninth Circuit:

OPENING STATEMENT.

ause poses a legal problem of considerable ce to the United States and to the effective ation of its immigration laws. The problem the scope and purport of Section 503 of the ty Act of 1940 (8 U.S.C. 903) in its applica- person seeking admission into the United r the first time, under claim of derivative

ceedings taken before the Immigration autho
prescribed by statute (8 U.S.C. 153). The
decision herein may well have serious impac
practical efficacy of the enforcement of th
migration laws intended to safeguard aga
entry of aliens into the United States witho
Appellee is convinced that a more complete p
tion of the case upon rehearing will satisfy t
orable Court that the ruling of the Distric
allowing into evidence the official records of
ceedings before the Board of Special Inqui
investigation of appellant's citizenship claim,
error. For the foregoing reasons, herein
tailed, appellee respectfully requests a r
herein.

I.

**"TRIAL DE NOVO" IS NOT A TERM HAVING ONE IN
MEANING. WHERE, AS HERE, IT RELATES TO
CIAL RE-TRIAL OF AN ISSUE ALREADY HEA
ADMINISTRATIVE PROCEEDING INVOLVING T
PARTIES, BEFORE A TRIBUNAL AUTHORIZED B
DETERMINE THAT ISSUE, THE TERM IMPLIES
EXAMINATION AND RE-EVALUATION OF THE
ADDUCED AT THE PRIOR PROCEEDING, TOGETH
A CONSIDERATION OF WHATEVER NEW AND AD
EVIDENCE IS OFFERED AT THE DE NOVO HEA**

Appellee finds no reported case arising ur
tion 503 of the Nationality Act holding, i
brought thereunder by a foreign-born plainti
claim of citizenship and right of entry into th

d consider the contents of the record of the
ıgs of that board, duly taken under the pro-
f 8 U.S.C. Sec. 153. On the other hand,
eow Tung v. Clark, 83 F. Supp. 482, we find
court, trying *de novo* the issue of plaintiff's
derivative citizenship in a suit filed under
ɔnality Act, admitted into evidence various
ts of proceedings had before the department
nd agencies to determine that issue; and,
here was such a conflict between the evidence
in those proceedings and testimony given at
the court decided that plaintiff had failed
ı his burden of proof that he was a citizen.
Ying Og v. Clark, 81 Fed. Supp. 696 the
tes with reference to Section 503 of the Na-
Act:

is clear that the statute contemplates a trial
ɔvo of the issue of citizenship and not merely
iew of the administrative action." (p. 697.)

nguage above quoted does not indicate a be-
the court hearing the trial *de novo* is pre-
om any consideration of the administrative
ken on the citizenship issue.

Grath v. Chung Young, 188 F. (2d) 975 (9th
), it appears from the opinion of this court
determination of nationality by the trial
that action was based on the finding of the
f Special Inquiry, together with additional
y offered at the trial.

Compensation Act of Montana. In *Worn*
conda Copper Mine Co., 43 P. (2d) 663,
Supreme Court of that state held that th
meant that

> "all the evidence taken by the board, ar
> additional evidence taken in the Cour
> be considered together and that, upon
> dence as a whole, the Court should rende
> ment."

The foregoing interpretation of the term
novo" has been judicially accepted as corre
eral other instances, to which we now refer t

(a) An appeal in admiralty entitles the
to a trial *de novo;* yet the record of the cou
is part of the evidence considered at the
appellate hearing.

> *The Cricket,* 71 Fed. (2d) 61 (C.A. 9
> 2 *C. J.* p. 318, Sec. 187a.

(b) In the article *"Appeal and Error",*
Juris, p. 726, Sec. 2647, it is stated:

> "Under the old chancery practice an
> under the Code of Civil Procedure,
> equity are tried de novo on appeal
> entire record and evidence."

(c) Congress, by Act of 1888 (25 St
granted to any Chinese person convicted
United States Commissioner of being u
within the United States in violation of the
Exclusion Laws, the right to appeal his c

imately reached the United States Supreme
llowing the taking of such an appeal. In
, it appeared from the Supreme Court opin-
he record of the proceedings before the Com-
r was received in evidence by the District
part of the proof upon which the case was
novo; and this practice was, at least tacitly,
by the Supreme Court. (*Liu Hop Fong v.
States,* 209 U.S. 453; *Ah How v. United*
93 U.S. 65; *Tom Hong v. United States,* 193
)

the leading case of *Ng Fung Ho v. White,*
276, in commenting on the *judicial* nature
tation proceedings under the Chinese Exclu-
, the Supreme Court stated, at page 283:
is commenced usually before a Commissioner
ne Court; *but on an appeal to the District
t additional evidence may be introduced and
rial is de novo.*" (Italics supplied.)

This court held in *Carmichael v. Delaney,* 170
239, (9th Cir. 1948) that a *resident* of the
States claiming citizenship, whose return to
try from abroad is prevented by an executive
order determining him to be an alien, may,
ceeding in habeas corpus, obtain a *judicial*
he issue of his claim to citizenship. Yet, it
rved by this court that at such *judicial* trial,
on to other evidence received:
e record made before the Board of Special

(e) The court may take judicial notice
numerous instances in which Federal statutes
ting of a judicial trial *de novo* of issues pr
determined administratively, also expressly
for the admission of the administrative recor
dence to be considered at the *de novo* trial.

The manner in which State Superior Cou
are conducted in California upon appeals fr
ments rendered in Justice's Courts on ques
fact, offers no criterion for the manner in wh
contemplated by federal law that a trial *de*
had under Section 503 of the Nationality Ac
issue of the citizenship of a foreign-born non
after the same had been previously heard an
mined in executive exclusion proceedings.
thing, trial proceedings in California Justice'
are not officially reported and there is, conse
no record available for appellate consideratio
thermore, California Code of Civil Procedure
980a is so phrased as to require, in the opinio
California Courts, the legal conclusion that
ceedings in the court below, on questions of
intended by statute not to be considered on
Neither can any analogy favorable to appella
tention be drawn from the manner in whic
trial is conducted when held before the same
tribunal. In the latter case, the new trial resu
some error which requires a complete vacatio
former proceedings.

novo" in the instant case, or the reasons orities herein given which fully support that

---

II.

ARENT THAT CONGRESS NEVER INTENDED BY SEC-503 OF THE NATIONALITY ACT, TO PROVIDE FOR UDICIAL TRIAL DE NOVO OF A CLAIM TO CITIZEN-ASSERTED THEREUNDER, WITHOUT REGARD FOR PROVED AT PRIOR EXECUTIVE PROCEEDINGS ULLY HELD TO DETERMINE THAT VERY ISSUE.

years prior to the enactment of the National-of 1940, Congress provided by statute for a ensive procedure whereby foreign born per-ing entry into the United States under claim ative citizenship, might have their claims nd determined by executive officials of the ent. (Immigration Act of 1917, 8 U.S.C. 153.) en long established by Supreme Court author-when a person, who has never resided in the States,

esented himself at its border for admission, mere fact that he claimed to be a citizen did entitle him under the Constitution to a cial hearing; and that unless it appeared that Departmental officers to whom Congress had usted the decision of his claim, had denied an opportunity to establish his citizenship, fair hearing, or acted in some unlawful or roper way or abused their discretion, *their*

Quon Quon Poy v. Johnson, 273 U.S. 352,
citing *United States v. Sing Tuck,* 194 U.S.
United States v. Ju Toy, 198 U.S. 253, 263; *C*
v. United States, 208 U.S. 8, 11; *Tang Tun*
223 U.S. 673, 675; *Ng Fung Ho v. White,*
276, 282.

This court has recently commented upon
dom of legislation committing to the final de
tion of executive officers of government, the
non-residents to derivative citizenship, and o
ing such determination to judicial review wit
only to the fairness of the administrative he
corded. In *Carmichael v. Delaney,* supra, t
recognized the potential practical difficulties
in the enforcement of the Chinese Exclusi
describing them as (p. 243, footnote 4) "d
which would be intensified if the member
undesired race were held entitled to a tr
formal than an executive hearing."

In the face of the long established nation
and procedure governing the enforcement of
the exclusion of aliens seeking to enter th
States unlawfully, and the reasons underly
policy and procedure, it would be entirely inc
therewith now to ascribe to Section 503 of
tionality Act of 1940, a meaning which m
effectuate a complete negation of such policy
cedure, although the reasons therefor remai
constant. Appellee submits, therefore, that

lass to which appellant belongs, wherein, fol-
full and fair administrative hearing and final
nation on the issue of his citizenship, he may
tigate that issue without respect for the facts
and findings reached at the administrative
f we are to maintain the integrity of those
rative proceedings, which are condition
t to any trial *de novo* under Section 503 of
ionality Act,—for there can be no right of
ereunder, until there has been an administra-
ial of citizenship,—the term *"trial de novo"*
accorded the meaning which has been given
e numerous instances hereinbefore specified.
se, untenable consequences can be expected to
f which the instant case is an example. That
: a foreign born person claiming a right of
virtue of derivative citizenship, whose claim
red by law to be heard and determined by
migration authorities, may, if his claim be
btain a judicial trial *de novo* of the issue of
enship, by filing a suit under Section 503 of
ionality Act. Then at the trial *de novo* he
essfully exclude from the court's examination
t of the record of the prior proceedings which
tain evidence damaging to his claim, albeit
on his own behalf. Thus he becomes em-
to use the administrative processes of this
ent as a preliminary trial run of his claim,
e can assure himself of a more advantageous
the judicial trial *de novo* of his citizenship

It is little answer here that the witnes
Gong, was in San Francisco at the time of t
physical presence there did not assure the a
the government to produce him, or validat
lants' objection to the trial court's consider
testimony he himself introduced at the prio
istrative proceedings.

The weight and credibility to attach to th
mony lies within the exclusive control of
judge, whose experience will qualify him to
in proper context in relation to whatever
additional evidence is offered *de novo*. Sitt
court of equity, he should not be restricte
consideration of this testimony, by the more
rules of evidence which obtain in common law

III.

APPELLANT'S AUTHORITIES DO NOT SUPPORT HIS THAT UPON A JUDICIAL TRIAL DE NOVO OF DETERMINED IN A PRIOR PROCEEDING BETW SAME PARTIES, THE CERTIFIED RECORD OF TH PROCEEDING IS INADMISSIBLE AS EVIDENCE T SIDERED BY THE COURT AT THE DE NOVO HEA

None of the cases cited in appellant's open
uphold the principle that a court trying *de*
issue previously determined in an administra
ceeding involving the same parties, is forbi
benefit of proof elicited at the prior proce
part of the evidence upon which its judicial

vo quotations cited on page 5 of appellant's brief, are from cases which merely rule that administrative hearings which do not have objective the determination of issues between have no probative value in a subsequent judi- thereof. An exclusion proceeding before the f Special Inquiry, acting under statutory tion of Title 8, U.S.C., Section 153, is for ess purpose of finally determining citizenship persons presumptively alien.

pellant's reply brief, p. 3-4, he cites the case *urg S.S. Co. v. Brown,* 171 Fed. (2d) 175 bsent proper analysis and distinction, might o lend support to his position with respect ture of the trial *de novo* to which he was here Actually, the contrary is so. *Pittsburg S.S. Brown* was a case factually similar to that l to the Supreme Court in *Crowell v. Benson,* 22. Both cases involved the same legal issue, lated to the admissibility in evidence of the f an administrative proceeding, at a judicial *novo* of certain of the matters determined in administrative proceeding. The decision in *g S.S. Co. v. Brown* followed that of *Crowell n.* We therefore turn to the latter case to ate that appellant's authority, rather than ng his position, actually substantiates that lee with respect to the meaning of trial *de* a suit under Section 503 of the Nationality

Act. *Crowell v. Benson,* like *Pittsburg S.S. Brown,* involved a suit to enjoin the enforc a compensation award made under the Lo men's and Harbor Workers' Compensation A Supreme Court there held that the trial cou ing *de novo* issues of fact upon which depe jurisdiction of the Compensation Commission the award, was justified in refusing to re evidence the transcript of the testimony be Deputy Commissioner relating to that p issue. But each reason advanced for the reached in *Crowell v. Benson* accentuates the ness of appellee's contention here as to the tr ing of "trial *de novo*" in a suit under Sectio the Nationality Act. We therefore submit th ing analysis of *Crowell v. Benson.*

First, *Crowell v. Benson* held that the deter by the Compensation Commission of the fac sary to sustain its own jurisdiction, need n been accorded evidentiary weight in the trial before the United States District Court, s trial *de novo* was for the very purpose of j ascertaining whether that jurisdiction actually But at page 57, the court makes this qualifica

> "In relation to the Federal governm have already noted the inappositeness to ent inquiry of decisions with respect to nations of fact *upon evidence and wi authority conferred, made by admin agencies which have been created to ai*

ormance of government functions and where mode of determination is within the control ongress." (Italics supplied.)

tizenship of a foreign born person, presumpien, who seeks admission into the United r the first time, is not a fact upon which the ion of the Immigration and Naturalization to exclude aliens has been made to depend. act which has been committed by law to the ermination of that executive agency.
nited States v. Ju Toy, 198 U.S. 253, 8 U.S.C. 153.

tion 503 of the Nationality Act has enlarged scope of the court's power to review such determination, it still remains the law that of citizenship in the case above mentioned, within the power of the Immigration and zation Service to determine.

lly: The rule of *Crowell v. Benson* is eximited in its application to cases arising be*ivate* litigants. On page 50, the court states: As to determinations of fact, the distinction once apparent between cases of private right those which arise between the government persons subject to its authority in connection the performance of the constitutional functs of the executive or legislative departments *. Thus Congress, in exercising the powers ided to it, may establish 'legislative' courts * to serve as special tribunals 'to examine

and determine various matters arising
the government and others, which fr
nature do not require judicial determina
yet are susceptible of it'. But 'the mo
termining matters of this class is c
within congressional control. Congress
serve to itself the power to decide, may
that power to executive officers, or ma
it to judicial tribunals.' ''

Thirdly: *Crowell v. Benson* did not hold
District Court was in that case *forbidden* fro
ing in evidence the record before the Deputy
sioner. It merely held that inasmuch as
being tried *de novo* related to the jurisdicti
Deputy Commissioner to hear and determine
ter before him, the court was "under no
to give weight to his proceeding pending the
nation of that question." (p. 64.)

Finally: Justice Brandeis, dissenting fro
jority opinion in *Crowell v. Benson,* expr
view that the trial court should have been
to receive in evidence and consider the reco
the Commission, stating, p. 85:

> "Nothing in the Constitution, or in a
> decision of this court to which attention
> called, lends support to the doctrine t
> dicial finding of any fact involved in
> proceeding to enforce a pecuniary liabi
> not be made upon evidence introduced
> properly constituted administrative tri

a determination so made may not be deemed independent judicial determination." (Italics plied.)

CONCLUSION.

ant makes no claim that he was not accorded ess at the exclusion proceeding before the Special Inquiry to determine his citizenship that the determination by that Board was on substantial evidence. He seeks, however, t an impotency to the entire exclusion pro- and the resulting determination unfavorable itizenship claim, by reading into the term *novo*", a meaning which could well succeed g upon this government the difficult burden oving a claimed father-son relationship al- have its origin on foreign soil. And thus , a presumptive alien, successfully relieve f the burden which at all times is legally his, ishing by a preponderance of the evidence, d States citizenship; a burden which should pon him full responsibility for explaining acies in testimony of his own offering at the ring.

ee respectfully submits that reason and law ast any definition of "trial *de novo*" in pro- under Section 503, which would deny to the t below the right to examine and weigh the eloped at proceedings before the Board of

Special Inquiry, on the issue of appellant's
ship.

Dated, San Francisco, California,
March 24, 1952.

Respectfully submitted,

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and Petitioner.

CERTIFICATE OF COUNSEL.

y certify that I am of counsel for appellee
ioner in the above entitled cause and that in
nent the foregoing petition for a rehearing
unded in point of law as well as in fact and
petition for a rehearing is not interposed

San Francisco, California,
March 24, 1952.

ANTOINETTE E. MORGAN,
Of Counsel for Appellee
and Petitioner.

No. 12987

e United States Court of Appeals for the Ninth Circuit

ORNIA ELECTRIC POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

BRIEF FOR RESPONDENT

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1952.

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ne United States Court of Appeals for the Ninth Circuit

No. 12987

FORNIA ELECTRIC POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

BRIEF FOR RESPONDENT

SDICTIONAL COUNTERSTATEMENT

a proceeding under Section 313(b) of the Federal [1] to review an order of the Respondent Commission the Petitioner Company to cease and desist from two wholesale customers in Nevada any rate other d rates." That is to say, from charging any rate the one embodied in the contract the Company had e filed with the Commission for its sale to Mineral ower System and the rate in the contract it should e have filed for its sale to the Naval Ammunition awthorne, Nevada, under the terms of filing require- hich the Commission determined were applicable. expressly provided, however, that such "filed rates" ntrol only "until and unless * * * duly super- new rates filed by the Company or by rates fixed by

351; 16 U. S. C. § 8251(b). In lieu of printing as an appendix the numerous provisions of the Act which we cite, we are the Clerk printed pamphlet copies of the Act for more conven- ce.

. Part 35; Federal Power Act §§ 205(c), 205(d), 20, 309. Rele-

counting requirements with respect to the excesse
"filed rates" which had been collected by the Comp
certain rulings on admissibility of evidence; and de
tion to reopen the record (R. 110–112, 146–148).
(R. 84–112) is reported in 89 PUR NS 359.[4]

Commission jurisdiction, insofar as here quest
conferred by the provisions of the Federal Power A
larly Sections 205(c) and 205(d) for regulation of ra
by "public utilities" in selling power at wholesale in
commerce; Section 20 of that Act providing for re
rates of licensees whose electric power enters inter
merce, and adopting the procedure and practice of
state Commerce Act in fixing and regulating railr
and Section 309, providing for issuance of orders,
regulations necessary or appropriate to carry out
sions of the Act.

The Company does not controvert the jurisdict
Commission to conduct the proceeding, to decide th
raised therein, and to issue an order accordingly.
that it is generally subject to regulation under the

[3] Petitioner describes the order as requiring it to cease and
charging Mineral County rates other than the previously filed
or until such rates were superseded by order of F. P. C." and f
Navy any rates other than those set forth in the last contra
Commission found should have been filed, and which it directe
Co. Br. 4; Petition, R. 624–625; see also Co. Br. 70. But the f
of the Commission's order (R. 110–112) left the Company c
liberty, either immediately or at any later time, to file higher r
in 30 days (or earlier for good cause) subject only to the usu
generally applicable to all changes in filed rates. Sections 205
18 C. F. R. § 35.3(c). The Commission had previously permit
rate schedule filings to become effective as of dates prior to
E. g., R. 604, 585, 589. The filing provisions of the Act and t
to those in the Interstate Commerce Act are discussed in *North*
Co. v. *Montana-Dakota U. Co.*, 181 F. 2d 19 (C. A. 8), *affirm*
246, 251–252.

[4] The order incorporates (R. 103) the Commission's opinion
The opinion (R. 95) refers to and reaffirms the conclusion previ
in *Safe Harbor Water Power Corporation* (5 F. P. C. 221, 66
affirmed, 179 F. 2d 179 (C. A. 3), *certiorari denied*, 339 U. S.

utility" within the special meaning of that term Part II (Co. Br. 6). Its objections run only to the on's decision that the rates in question are subject ssion filing requirements, that the Company should he rates which it had attempted to raise without with filing requirements, and that it charge only

It also objects to Commission rulings on admissi- vidence and on a motion to reopen the record. ttempting a more detailed statement of the issues by the petition for review, some correction of the atements in Petitioner's brief and some augmenta- of is desirable to show how the issues arose after any had acquiesced in a long course of Commission dverse to the Company's present contentions.

LEMENTARY STATEMENT OF THE CASE

ministrative interpretation. For over 13 years the ged by the Company and its corporate predecessor to Mineral County were filed without questioning ability of the Commission's filing requirements.[5] l herein shows that many of the Company's filings ent or former name (see notice of change of name, ere permitted by the Commission to become effec- dates prior to the dates upon which they were filed 604, 585, 589). In those cases the Company (the rporation) did not, as it now suggests (Co. Br. 69),

filing took effect January 20, 1936 when the Commission's nplementing Sections 205(c) and 205(d) first became effective. e by the Company's immediate corporate predecessor, The rra Power Company. The Company continued to file all new l amendments, at first under its then corporate name of The ornia Electric Corporation until it changed its name by amend- cate of incorporation in 1941, and thereafter under its present 5–615, 165–166, 404–412). The service rendered and the rate e defined in the contracts, and all F. P. C. filing requirements l by filing the contracts—the usual practice under the Federal where a single or very few customers receive the same service. ere made in accordance with legal advice given the Company

initiated the new practice of expressly making its effective as of a date prior to the filing date, subje faction of the Commission's filing requirements (R 587, 408).[7] In those cases the Commission did n not disapprove the Company's filings, or abstain pending them, but affirmatively asserted its jurisd them by issuing orders pursuant to the last sentence 205(d) of the Act and Section 35.3(d) of its Rules (§ 35.3(d)), waiving the advance notice requirement ing the rates to become effective as of the contract

Furthermore, in 1940, upon very similar jurisdict the Commission had exercised authority over the under its then corporate name to regulate a rate c City of Los Angeles, and the Company had acquies Commission's decision reducing that rate. *City o geles* v. *The Nevada-California Electric Corporation* 104, 32 PUR NS 193.

Attempts to change rates without filing new When the Company on October 15, 1948, submitted proposed rate applicable to Mineral County, represe percent increase (R. 241), the Commission by four letters over a period of six months repeatedly requ mission of the additional data required by the rules sary to permit a preliminary check of the justificati increase (R. 88–89). At length the Company (whic viously been granted a corresponding increase in c by the California Commission) on March 22, 1949 its incomplete submittals, instead of furnishing the data (R. 88–89). Shortly afterward the Company report for 1948, filed May 2, 1949 (Certified Transcri

[6] For an example of that practice, see R. 610–615.

[7] Those provisions, according to the Company's Vice Pres Delvaille, were included because the Company's "legal staff f necessary at that time" (R. 376). A Company letter dated I 1939 and signed by the same G. C. Delvaille explicitly state "This schedule covers an agreement for an interstate sale at v resale between The Nevada-California Electric Corporation and

disclosed that it had received revenues from Mineral
hich could not be reconciled with the last completed
, and the Commission, under date of June 8, 1949,
an explanation of the discrepancy (R. 579). Re-
o answer, the Commission made a further request
e of July 20, 1949 (R. 580).

ly (R. 565) signed by the Company's Vice President
lvaille under date of August 4, 1949, the Company
at since August 1, 1948 [8] it had been charging and
from Mineral County at a higher rate. The Com-
ner stated that it was billing the Navy at an increased
that the Navy had refused to pay at the higher rate.
pany continued to serve the Navy under a "letter of
ated June 29, 1949, by which the Navy had under-
ay "the old rates with the provision that, if a differ-
ere thereafter agreed upon or fixed by any regulatory
ng jurisdiction in the premises, such new rate should
n October 1, 1948" (R. 566–568).

mpany's letter went on to say that the Company be-
t the service and rates were subject to regulation by
rnia Commission [9] "for the reason that all of the
livered to Mineral County Power System * * *
ed in one or more projects licensed" by the Commis-
Sections 19 and 20 of the Federal Power Act provide
and service in such cases are to be fixed by State
ns, if any, even though the energy enters into inter-
merce." Also that transmission by both customers
pt under Section 201(f) of the Act and hence the
s sales to them were not in interstate commerce. It
that the Company would "await a contrary order, if
sue" (R. 568–569).

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e was subsequently admitted to be erroneous, the correct date
r 5, 1948 (R. 368).

earing Vice President Delvaille declared that he "would not
y as to say that we were advised [by the Company's legal staff]
obligated" to file the Mineral County rate with the Federal
ission (R. 379–380). Mr. Delvaille further testified that he

mental application to the California Commission fo
applying the "P–2" and "P–3" rate schedules to these
a hearing was held by that Commission Octobe
(R. 151–152).

In December, following the California Commissi
ing on the supplemental application, Mineral Cou
a letter to the Federal Power Commission complai
it had been overcharged more than $12,000, and that
charge was continuing at the rate of approximately
month. It sought refund of the excess and restorat
filed schedule "until such time as permission to ch
schedule has been authorized by the proper a
(R. 537–538).

Commission proceedings. After correspondence
California Commission, before which the Company
mental application then remained pending, the Fede
Commission issued a "show cause" order[10] initiati
ceeding to determine the applicability of its filing req
to both the Mineral County and Navy rates (R. 1–
order also set a hearing to be held concurrently with
of the hearing being held by the California Commiss
under a plan of cooperative procedure previously
between the Power Commission and State Commi
C. F. R. § 1.37).

The order expressly provided that other interes
Commissions might participate, either by holding a c
hearing under the same plan, or as intervenors (R.
Nevada Commission responded to notice of that sh
order, stating that it would not participate but wou
representative attend as an interested party only (R
and it did so (R. 153–156, 183–184, 186–188).

In the Commission's proceeding appearances wer
and briefs and reply briefs filed with the Commissi

[10] A "show cause" order is provided by the Commission's rules
for initiating a proceeding. 18 C. F. R. § 1.6(d).

[11] This recital of facts discloses the lack of foundation for th

, Mineral County, the California Commission, the
d the staff of the Federal Power Commission, sev-
. 13–14). Exceptions to the Examiner's Decision
with the Commission for Mineral County, the Navy,
staff of the Federal Power Commission, severally
3). Applications for rehearing were filed with the
on by the Company and the California Commission
32) and denied (R. 146). Only the Company peti-
Court review (R. 623), and the 60-day period in
h a petition could be filed by the California Com-
as expired.

rstatement of the questions presented. We would
questions presented as follows:

respect to Commission jurisdiction over these rate
der Part II of the Act (relating to regulation of
wholesale" "in interstate commerce" made by "public
—

ne Company, which is a "public utility," impliedly
s a licensee from rate filing requirements under

these sales "in interstate commerce" notwithstand-
ction 201(f) exemption of the purchasers?
these sales "sales at wholesale" under Part II?
these sales excepted by the Section 201(b) exception
s "used in local distribution"?
h respect to Commission jurisdiction under Part I
to licensees)—
s the power here "enter into interstate commerce"
e meaning of Section 20, and is that Section ap-
o the exclusion of Section 19?
the Commission properly find the lack of qualified
missions which is prerequisite to Commission regu-
der Section 20?
d the termination of the contracts bar the Commis-
ordering the rates, therein set forth and not can-
hanged, to be adhered to, or to be filed where not

SUMMARY OF ARGUMENT

In view of the number of questions which we
the Argument it seems desirable that this Summ
lective rather than comprehensive. So also, the la
of cases we rely upon impels us here to omit duplic
tions thereto for the most part. We shall merely
convey an impression of the trend of our argument,
to define its scope.

I

None of the Company's four objections to Commi
diction under Part II to require filing of rates for
discloses any error.

A. As an admitted "public utility" subject as su
regulation under Part II of the Act, the Company is
from rate regulation under that Part, by reason of
a licensee under Part I. Directly in point are *So*
W. P. Corp. v. *F. P. C.* (179 F. 2d 179 (C. A. 3)
denied, 339 U. S. 957) and *Pennsylvania W. & P. Co.*
(— F. 2d —, C. A. D. C. Nos. 10,236, 10,239, 10,5
July 3, 1951, *certiorari granted,* February 4, 1952),
Commission regulation of rates of licensee-"publi
over objections that licensees are wholly exempt fro
II regulation. The grounds of those decisions are
fully applicable to the narrower claim of exemption

B. The Section 201(f) exemption "from the pro
Part II of the Company's two publicly owned purch
not extend to exempt the privately owned Company
sales to them. Petitioner's theory that the purcha
mission of the energy out of state becomes nonexis
Section 201(f) is contrary to the uncontroverted evi
one cannot exist without the other, and contrary
201(c) of the Act which provides that "energy sh
to be transmitted in interstate commerce if transmit
state and consumed at any point outside thereo
regard to who owns or operates the facilities

nship by which two definitions of the Act tacked to
r literally exempt sales to these purchasers (the Navy
unty agency) was not intended by Congress to have
lt. It should not be given that effect because that
wart a clearly defined major purpose of the Act. The
t course of administrative interpretation is opposed
xemption and an argument based on the same literal
of the Act has been overruled *sub silentio* by the Su-
urt. *Connecticut L. & P. Co.* v. *F. P. C.*, 324 U. S. 515.
e to the Navy is not removed from Commission juris-
nder the plain terms of the Act and applicable de-
y the circumstances under which the resales are made;
fact that a larger part of the energy is not resold, the
king it clear that the Commission's jurisdiction is not
ed "upon any particular volume or proportion" (*Con-
L. & P. Co.* v. *F. P. C.*, 324 U. S. 515, 535–536); or by
hat the Company does not contract for or intend the
be made (*Jersey Central P. & L. Co.* v. *F. P. C.*, 319
68–73).

se two Company *sales* are not withdrawn from Com-
egulatory jurisdiction by the Section 201(b) exception
es "used in local distribution." They are indistin-
from the sale held constitutionally beyond state rate
y jurisdiction in *P. U. C.* v. *Attleboro S. & E. Co.* (273

The rate regulatory provisions of Part II were en-
ill that gap in electric utility regulation. Transmis-
he Company over distances up to 80 miles, and 50
ther by the purchasers, from isolated hydroelectric
remote communities, cannot properly be held to be
tribution" (*F. P. C.* v. *East Ohio Gas Co.*, 338 U. S.
470).

II

mpany's objections to Commission jurisdiction under
equally without merit. That the electric power is
astate commerce where taken across the state bound-

Section 20 was intended to apply to all sales in inter
merce to the exclusion of Section 19, as shown by it
It is not clear whether Congress in Section 20 in
authorize state regulation of licensee's rates in inter
merce by interstate compact where such rates lie c
constitutional power of the states under the comme
But in any event there are two threshold requiremer
regulation of rates under the terms of Section 20: (1)
tion provides its own standard of lawful rates whic
enforced by an agency provided for that purpose b
(2) Enforcement must be the result of agreement th
properly constituted authority of each state. Here
no agency properly constituted by one of the state
Hence, the prerequisite to Commission regulation
terms of that Section is clearly met.

The Commission's order merely directs the Comp
charge any other rate than its last legally filed, uncar
unchanged rate for its sale to Mineral County, whi
may legally charge in any event. The Company '
no rate as a legal right other than the filed rate
Montana-Dakota U. Co. v. *Northwestern P. S. Co.*,
246, 251. For the sale to the Navy, for which no rat
been filed, the order merely directed filing of the
actually being paid, defined in the contract claime
been terminated. The Company, by unsuccessfully
ing to collect a higher rate without complying with
filing requirements, could not entitle itself to the h
Cf., Armour Packing Co. v. *United States,* 209 U.
Company counsel recognize that there is here no ques
fairness of the rate.

IV

From the nature of the evidence involved in the c
Commission rulings it is clear that the rulings could
been prejudicial and could not invalidate the Cor
order under Section 308(b).

ARGUMENT

I

GUMENTS ADVANCED TO AVOID COMMISSION G REQUIREMENTS UNDER PART II DISCLOSE ROR BY THE COMMISSION

f the four claims advanced by the Company to avoid g with the Commission filing requirements under Part Act has been considered and rejected by the Commis- previous cases, and by the appellate courts where before them. None of those claims or the Company's g arguments will be found to disclose any error in the ion's decision here under review or any reason for g the prior decisions.

ompany Is Not Impliedly Exempt as a Licensee From Rate Filing Requirements Under Part II

ing that it is both a licensee under Part I of the Act 7–8) and a "public utility" subject to regulation as er Part II "as to certain activities, such as accounting issue of securities, sale of property, etc." (Co. Br. 6), pany devotes a large part of its argument (Co. Br. –48) to the contention that nevertheless, as a licensee, ubject to regulation under Part II with respect to these . Br. 33, 42). The Company sums up what it wants (Co. Br. 44–45): "Licensees simply form a class to nether engaged in intrastate or interstate commerce or tions 19 and 20 of the Act apply. The rate regulatory of Sections 205 and 206 of Part II apply to others nsees."

c Utility" Is Not Exempt From All Regulation Under Part II Where It Is Also a Licensee

mpany's present admission that it is subject to some n as a "public utility" under Part II reflects a nar- aim than has previously been considered by the

claims of complete exemption of licensees from al
regulation. *Safe Harbor W. P. Corp.* v. *F. P. C.*, 179
(C. A. 3), *certiorari denied,* 339 U. S. 957; *Pennsylv*
P. Co. v. *F. P. C.*, — F. 2d — (C. A. D. C. No
10,239, 10,531), decided July 3, 1951, *certiorari gra*
ruary 4, 1952. We think it will be simpler for us
the Company's claim by first briefly reviewing the re
the broader claims were denied, and second, showing
reasons apply as well to the present claim for exem
from Sections 205 and 206 of that Part.

The *Safe Harbor* case, *supra,* was a proceeding to
Commission order reducing Safe Harbor's rates by so
000, annually. The Safe Harbor Company, a license
within the Part II definition of "public utility," cla
to be subject to any regulation under Part II as a "p
ity" because it said that as a licensee it was subject
tion under Part I and entitled to have its rates, am
activities, regulated under Sections 19 and 20 of Part
those Sections, it argued, the reasonableness of its ra
be tested by a different standard (fair return on an
ciated investment rate base) from that which the Co
had used under a judicially approved interpretatio
II (fair return on a depreciated investment rate bas
a licensee it had a vested right to have its rates regula
the Part I standard. Safe Harbor also contended, as
pany does here, that it was entitled to State regula
rates under Sections 19 and 20, because the Comm
erred in finding that the states directly concerned we
to agree."

The Third Circuit overruled both of Safe Harbor
tions and held the Commission's rate order to be v
Commission's jurisdiction under both Parts I and I
the Company's first claim, the Court held that the
substantive conflict between Parts I and II becaus
visions of Part I prescribed no different standard
rates than that prescribed by Part II (179 F. 2d at

tion 20 and consequently that the Commission had
n. It added (179 F. 2d at p. 185, note 10):

* * certain portions of Parts I and II are incon-
ent with each other unless we, or some other court,
l a rational reconciliation as we think we have done.
he provisions of the respective Acts cannot be recon-
d then the former must be deemed to be repealed
the latter. *Cf.* our earlier opinion, 124 F. 2d at
ges 803–804.

or certiorari based on the same two contentions was
the Supreme Court (339 U. S. 957).

Penn Water case, *supra,* another licensee-"public
gain advanced the same two contentions in seeking
f Commission orders under both Parts I and II re-
rates by approximately $2,000,000 annually. In
the Court of Appeals for the District of Columbia
lso overruled both contentions. That Court went
an the Third Circuit; it noted as to the first conten-
he Third Circuit had pointed out the essential same-
ne rate base requirements of Parts I and II (slip
10–11), and went on to hold that the provisions
action in Part I do not require reading "an implied
for licensees into Part II" (slip sheet, p. 9). A brief
its reasons should be of help in the present proceed-
question discussed in the next section of this brief,
ner an exception should be implied for licensees from
ular provisions of Sections 205 and 206.

ry terms expressly apply. The opinion of the Court
s for the District of Columbia Circuit starts with
nat the express language of Part II contains no ex-
th respect to licensees. It points out that the con-
omission of licensees from among the express
s in Section 201(f) tends to negative an implied
(slip sheet, p. 9):

t seems unlikely that Congress would not have in-
ded so important a group as federal waterpower

to point out (slip sheet, p. 9) that the only judicial in point, the two *Safe Harbor* cases in the Third Ci opposed to any such exception of licensees, and tha in the two other cases upon which the Penn Wate relied did not involve Part II or discuss the po conflict between Parts I and II.

Legislative history shows applicability. The op tinues (slip sheet, p. 9) by showing that legislative Part II also supports application of Part II to lic refers to the fact that the House Committee Repor stated that licensees would be included amor utilities."

Exception would create nonuniformity. Finally points out (slip sheet, p. 10) that when Congress i cided to provide a new system of federal regulatio interstate commerce in electric energy, application tem to nonlicensees alone would have resulted in n ity: different treatment of licensees and nonlicens same kinds of transactions. Congress, the Court therefore made the new system of federal regulation to licensees as well as nonlicensees and to that ex seded any conflicting provisions for state regulati I which, in the absence of any general scheme of fe lation of electric utilities in 1920, had placed primar upon state regulation in order to make treatment as much like that of ordinary public service cor possible.

Resolution of conflict not necessary where the correctly found "unable to agree." Independently going considerations, the Court reviewed and uphel mission's determination that Section 20 itself gave mission jurisdiction inasmuch as the states were agree (slip sheet, p. 11), as the Third Circuit had *Harbor* case, *supra.*

t II Is Not Impliedly Exempted as a Licensee From Regulation tions 205 and 206

mit that the principles upon which the *Safe Harbor Water* cases were decided are sound and require re- the Company's present narrower claim of exemption ions 205 and 206.

205(a) expressly applies to "*All* rates and charges by any public utility for * * * sale of elec- y subject to the jurisdiction of the Commission." 06(a) expressly applies to "*any* rate (or) charge by any public utility for any * * * sale subject isdiction of the Commission." Other subsections of 05 are similarly phrased. Thus these Sections are made applicable in the same terms as the entire Part apply to every "public utility," a term which, by 01(e) is expressly given the same constant meaning d in this Part or the Part next following." In fixing ing "sale subject to the jurisdiction of the Commis- ed with the same meaning as in Sections 205 and 206, Section 201(b) which provides that "The provisions *t* shall apply to the * * * sale of electric energy le in interstate commerce (etc.)." "Sale of electric wholesale" is also given the same constant meaning ed in this Part" (Section 201(c)). Subsection (f) e Section 201 provides express exceptions which also ne for all of Part II: "*No* provision of this *Part* shall (etc.)." (The enumeration which follows does not ensees.) [12]

ch as the key terms defining the applicability of Sec- nd 206 are the key terms determining the scope of all and have the same constant meaning throughout that hat the District of Columbia Court of Appeals found ress terms of Part II, in prior judicial utterances, and ve history is equally pertinent here.

is what that Court said as to the purpose of Con- roviding a new system of Federal regulation, to make

by all "public utilities," whether or not licensees. T
ticularly pertinent in the present case. For these ra
appropriately regulable by the Commission as they w
charged by a company which was not a licensee but
all of its energy by steam plants. Moreover, if lice
lic utilities are subject to *security* regulation under Se
as the Company admits (Co. Br. 6), it seems who
sistent with any concept of uniformity to say that th
subject to *rate* regulation under Sections 205 and 20
same provision is made for state regulation of both i
19 and 20.

If the Court upholds our present contention, it sho
the Commission's jurisdiction to issue the order, reg
whether or what it decides about the Commissio
diction under Part I. If we are correct in the cont
make below (pp. 32–40) that the Commission, rathe
States, had jurisdiction under Section 20, this Court s
hold the order on that ground, regardless of whether
our present contention, or leaves the question undec
and this we think more appropriate, the Court may u
Commission's jurisdiction on both legs.

**B. These Sales Are "In Interstate Commerce" Notw
ing the Section 201(f) Exemption of the Purc**

In adopting many of the arguments heretofore mad
companies seeking to avoid Commission regulation
terms of Part II (Co. Br. 58–67) the Company in
argument, recently presented to this Court in *F. P. C.
Edison Co.*,[13] that inasmuch as the energy crosses the
Nevada boundary on facilities owned and operated b
owned agencies exempted by Section 201(f), that
the two-state journey of the energy must be treate
existent, and the remainder treated in and of itself
it were *intrastate* (Co. Br. 61–64).

We shall not attempt to pursue the logical dilemma
from the Company's attempt to treat its own trans

ntroverted evidence in the record that one could not
hout the other (R. 304, 307–309). But assuming,
, that this logical impasse could be surmounted, the
y's argument is based on a clear misreading of Section
That Section provides that no provision of Part II
ly to the enumerated public agencies.[14] It cannot,
doing violence to its express terms, be "interpreted" as
read, *apply to activities* of the public agencies, mak-
transactions nonexistent for the purpose of determin-
pplicability of Part II to others who are not publicly

rmore, the argument overlooks the clearly applicable
Section 201(c) that "electric energy shall be held to
nitted in interstate commerce if transmitted from a
d consumed at any point outside thereof." By this
nd unequivocal definition, written into the same Sec-
subsection 201(f), Congress has made transmission
tate commerce wholly independent of the ownership
ilities by which it is accomplished.[15]

Senate hearings on the bill which subsequently became Part II,
nce to Section 201(f) by Mr. DeVane, then Solicitor of the
, and one of the draftsmen of the bill, confirms the intention
the public agencies, not to create "a negative domain so far as
concerned and an activity of which no notice is taken" (Co. Br.
DeVane stated (Senate Hearings on S. 1725, 74th Cong., 1st Sess.,

ANE. We did not feel that it was within our province to prepare
would undertake to regulate municipal, State, or Government

as all governmental projects are concerned, our approach to the
s that in the legislation creating those authorities and giving
orities their powers, this Congress had provided the power that
those agencies to have, and it did not seem to us that it was
attempt to bring those other governmental agencies under the
of the Federal Power Commission; so that in our preparation
we have left them out, and they are outside the pale of this bill.
BARKLEY. On the theory that it is not necessary for the Govern-
ulate itself?
ANE. That is right."
ompany (Co. Br. 64) relies on *Idaho Power Co.* v. *F. P. C.*, 189

Wholesale" under Part II

At the time of the enactment of the Federal Pow
1935, although sales of electric energy or natural gas
in one state, transmitted or transported into another,
consumed, had been held subject to state regulation
sales were made *by* a local distributor to ultimate c
(*Pennsylvania Gas Co.* v. *P. S. C.*, 252 U. S. 23; *P*
Landon, 249 U. S. 236), they had been held consti
exempt from state regulation when made *to* such a loc
utor (*Missouri* v. *Kansas Gas Co.*, 265 U. S. 298; *P*
Attleboro S. & E. Co., 273 U. S. 83). To fill the resu
in electric utility regulation Congress, following th
demarcation which seemed indicated by those cases,
federal regulation for sales in interstate commerce
but not for sales at retail in local distribution.[16]

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regulatory action by F. P. C." If the *Idaho Power* case sto
proposition, it still would fall short of supporting the argumen
Company must make to prevail on this point, *i. e.*, that the
public agencies are activities "of which no notice is taken" (C
that is, are legally nonexistent—for the purpose of determining
of a privately owned "public utility" to Part II regulation. Bu
Power case does not even stand for what the Company says,
this: that under Section 201(b) Idaho Power Company could
pelled to "wheel" power on the application of the United State
201(f); hence, that it cannot be compelled to "wheel" for the U
by a license condition under Section 10(g) because that Section
conditions "not inconsistent with the provisions of this Act."

It may be added that the Commission deems the decision of th
erroneous and has petitioned the Supreme Court for a writ o
The petition has not been passed on at the time this brief goes t

[16] The Senate Committee Report (S. Rep. No. 621, 74th Cong
p. 48) states the matter as follows: "Subsection (b) defines t
this part of the act and the jurisdiction of the Commission. It
apply to the transmission of electric energy in interstate co
sale of energy at wholesale in interstate commerce * * *
not apply to the retail sale of any energy in local distribution
section leaves to the States the authority to fix local rates ev
where the energy is brought in from another State. In *Penns*
Co. v. *Public Service Commission* (252 U. S. 23), the Supreme
that such rates may be regulated by the States in the absence
legislation. The present bill carefully refrains from asserti

e the clearly defined area thus excluded by Congress
nmission regulation so as to exclude these sales from
ion jurisdiction without regard to the fact they are
he kind of sales Congress intended to regulate because
ionally beyond state regulatory jurisdiction under the
erred to. But that these sales are basically indis-
ible from the sale held constitutionally exempt from
ulation in the *Attleboro* case is tacitly conceded by the
. For in its sole effort to avoid that case (Co. Br.
he Company relies on its argument that licensees are
rom Sections 205 and 206 *because Congress in the*
of its powers over public lands had provided for state
n of their rates under Part I. Its distinction is that
which was there involved was not a sale subject to
Congressional provision for state regulation, thereby
onceding that in the absence of such Congressional
, these sales, like that in the *Attleboro* case, are the
stitutionally not subject to state regulation. (We
where, *supra,* pp. 11–16, *infra,* pp. 32–40, that by Sec-
hese sales were subjected to Federal, not state regu-
ence, even this attempted distinction fails.)

—

tilities Commission v. *Attleboro Steam & Electric Co.* (273 U. S.
beyond the reach of the States. Jurisdiction is asserted also
terstate transmission lines whether or not there is sale of the
ried by those lines * * *. Facilities used only for intrastate
or local distribution are expressly excluded from the operation

se Committee Report (H. Rep. No. 1318, 74th Cong., 1st Sess.,
ates: "The new parts are designed to meet the situation which
reated by the recent rapid growth of electric utilities along in-
es. The percentage of electric energy generated in the United
was transmitted across State lines increased from 10.7 in 1928
933. The amount of energy transmitted in interstate commerce
s greater than all of the energy generated in the country in 1913.
decision of the Supreme Court of the United States in *Public*
mmission v. *Attleboro Steam & E. Co.* (273 U. S. 83), the rates
interstate wholesale transactions may not be regulated by the
rt II gives the Federal Power Commission jurisdiction to regulate
A 'wholesale' transaction is defined to mean the sale of electric
resale and the Commission is given no jurisdiction over local

other grounds is compelled by the absence of any facts
it could be distinguished. Clearly the fact that deliv
these sales is made at a point located 18 to 25 mil
the state boundary is crossed (R. 321, 292), instead
boundary, will not suffice. The courts have co
reached the same results regardless of where title ch
to sale [17] and transmission [18] in the state of produ
the state boundary,[19] and as to transmission [20] and sal
state of consumption after the state boundary has bee

The sales here are, therefore, precisely within the
of Congress in enacting Part II and the only questi
considered are whether the quirk of statutory drafts
or the particular factual circumstances of the Navy
relied upon by the Company, stand in the way of
out that purpose.

1. The Literal Definitions of the Statute Were Properly Treate Commission As Not Excluding These Sales

Reviving an argument which had been consistently
by the Commission in previous cases [22] and overr
silentio by the Supreme Court,[23] the Company, before
mission and in this Court (Co. Br. 59–61), tacks the
of "sale at wholesale" in Part II (Section 201(d)),
"to any person for resale," to the definition of "p
Part I, as excluding the United States and a county
agency (Sections 3(4), 3(3), 3(7)), with the literal r

[17] *Interstate Natural Gas Co.* v. *F. P. C.*, 331 U. S. 682, 687–688
E. L. Co. v. *F. P. C.*, 131 F. 2d 953, 958 (C. A. 2), *certiorari denie*
741; *Peoples Natural Gas Co.* v. *F. P. C.*, 127 F. 2d 153, 155 (C.

[18] *Jersey Central P. & L. Co.* v. *F. P. C.*, 319 U. S. 61, 69.

[19] *P. U. C.* v. *Attleboro S. & E. Co.*, 273 U. S. 83; *F. P. C.* v. *Ho*
Gas Co., 320 U. S. 591, 594.

[20] *F. P. C.* v. *East Ohio Gas Co.*, 338 U. S. 464.

[21] *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498; *Colorad*
Gas Co. v. *F. P. C.*, 324 U. S. 626, 630–631.

[22] *Otter Tail Power Company*, 2 F. P. C. 134, 136–140, 33 PUR N
269; *Connecticut Light & Power Company*, 3 F. P. C. 132, 144, 4
170, 178–179; *Otter Tail Power Company*, 8 F. P. C. 393; See also
Angeles v. *The Nevada-California Electric Corp.*, 2 F. P. C. 10

of the legislative history of these definitions will show
iteral result is a quirk of draftsmanship utterly unin-
while a consideration of the policy of the legislation
e will make plain that this is, as the Commission has
y held, a proper case for following the purpose of the
ther than the literal words. *United States* v. *Ameri-
cing Associations,* 310 U. S. 534, 543, and cases cited;
tates v. *Rosenblum Truck Lines,* 315 U. S. 50, 55.
ese circumstances, the course of consistent interpreta-
e Act by the agency charged with its administration is
o weight. *Norwegian Nitrogen Co.* v. *United States,*
294; *United States* v. *American Trucking Associa-*
U. S. 534, 549; see Gellhorn, Administrative Law
Comments (2d Ed., 1947), p. 204.

roduction into the definition of "wholesale sales" of
"person," which had an artificially restricted defini-
ection 3 of Part I, had no purpose in itself but was
incident to a rephrasing which cured an obvious de-
nother aspect of the previous wording. Under the
wording, the definition of wholesale sale did not use
'person." [24] That word first made its appearance in
eported by the House Committee. But the House
e report, in commenting on the changed definition in
erely stated that "A wholesale transaction is defined
he sale of electric energy for resale * * *" (H.
1318, 74th Cong., 1st Sess., p. 8), not using the word
Furthermore, the report expressed no purpose that
unicipalities were to be exempted. This is signifi-
where an exemption was intended, the report expressly

ate definition (slipped into the bill by amendment from the Sen-
Cong. Rec. 8858) provided that "Electric energy shall be held
t wholesale in interstate commerce within the meaning of this
hen it is sold for resale after its transmission in interstate com-
fore such transmission if the same is thereafter so transmitted."
ition contained a "joker." It covered wholesale sales before
terstate transmission, but omitted sales made in the course of
ission, and would have made the Act inapplicable to the very

intended to broaden the Senate definition which it
lends additional support to the view that "person"
201(d) was not intended in the artificially restricte
of Section 3.[26]

When we turn to the legislative history of the de
Section 3 of Part I, which literally fix the meaning o
it is likewise plain that there was no Congression
thereby to exempt sales of the kind here involved.

Section 3(4) defines person as "an individual or co
which would, literally, eliminate the Navy.[27] Fu
Section 3(3) in defining "corporation" expressly excl
from a "municipality" which is defined in Section
clude a county or agency of a state competent unde
thereof to carry on the business of transmitting or
ing power—hence literally excluding Mineral Coun

This definition of "person" was added to Sectio
original draft of the 1935 amendments, along with
of certain other terms. It, therefore, could not ha
tended originally to affect the meaning of "whol
which, as we have seen, was not defined in languag
term "person" until later. The "usefulness" of the ad
tions was said in the Committee Report to be "obvi
no further explanation was given.

It seems only reasonable to conclude that when the
of "wholesale sale" in Section 201(d) was rewrit
House, the word "person" was used without awarer
draftsmen of the artificially restricted meaning whic
given that word in the original bill.

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[25] Thus, immediately following the restatement of the definit
sale sales, the report added (*ibid.*) "and the Commission is gi
diction over local rates even where the electric energy moves
commerce."

[26] The Conference Committee adopted the House definition
ment. H. Rep. No. 1903, 74th Cong., 1st Sess.

[27] See the portions of our brief in *United States* v. *F. P. C.*
(C. A. 4) Nos. 6273, 6274, decided October 1, 1951, quoted in th
brief in this case (pp. 59–61).

[28] Sen. Rep. No. 621, 74th Cong., 1st Sess., p. 42. A simil

ve turn from the silence of the legislative history as to
tion to provide the exemption claimed by the Com-
a consideration of the policy of the Act as a whole, it
at such an exemption would thwart the over-all pur-
ne legislation.

Commission stated in *Otter Tail Power Company*
. 134, 137, 33 PUR NS 257, 260) it would mean that
may not discriminate in rates charged private persons
ations, but is at complete and unfettered liberty to
n the rankest discrimination as between municipali-
s between private customers and municipalities, re-
ne same service." It is hardly likely that Congress
to deprive consumers served by the thousands of
lly owned distribution systems, of the protection it
ding from unjust and unreasonable interstate rates.
sult would be completely at variance with the basic
f the rate provisions of the Act, which were designed
ne gap" in rate regulation disclosed by *P. U. C.* v.
S. & E. Co. (273 U. S. 83). See *Jersey Central P.*
v. *F. P. C.*, 319 U. S. 61, 67–68, 71, 80–81.[29] With
ose even critics of the proposed legislation were in
t.[30]

rmore, to adopt the Company's contention would fail
bstantial effect to other provisions of the Act, *e. g.*,
06, allowing a municipality to file a complaint on
"anything done or omitted to be done by any licensee
utility in contravention of the provisions of this Act,"
on 313(a), permitting review of Commission orders

ally it might appear that "filling the gap" on sales to munici-
uld be a futile thing with respect to the energy resold by
es at wholesale, since that resale is exempted from the Act.
sales were recognized to be of rare occurrence; and in any
or purposes of private profit, so as to fall within the normal
te regulation. Hearings, House Committee on Interstate and
mmerce, on H. R. 5423, 74th Cong., 1st Sess., pp. 569, 570, 2061–
ngs, Senate Committee on Interstate Commerce, on S. 1725,
st Sess., p. 256.

s, House Committee on Interstate and Foreign Commerce, on
74th Cong., 1st Sess., pp. 647, 48, 851, 1059, 1068, 1560, 61, 1612,

mission further observed in *Otter Tail Power Compa*
p. 23) "Since the most serious, if not the only real
a municipality could have against a public utility wou
the rates charged it for electric energy at wholesale
mission has no power to regulate the retail rates o
utility), it is most persuasive Congress intended tha
jurisdiction over such wholesale rates."

We may conclude this point by calling attention ag
Connecticut L. & P. Co. case (*supra*, p. 20, n. 23). In
the Connecticut L. &. P. Co. had made a similar
against one aspect of the Commission's order there
view. In reply the Commission's brief advanced ma
same considerations we have set forth herein.[31] The
Court, while setting aside the Commission's order in
and remanding the matter to the Commission for fu
ceedings consistent with its opinion, significantly di
that the Commission was in error as to its jurisdiction
to municipalities (324 U. S. 515, 536), thus overr
silentio the same argument advanced by the Compa

2. The Particular Circumstances of the Navy's Resale We Treated by the Commission as Not Excluding the Sale to

The Company contends (Co. Br. 64–67) that the
Navy is not "for resale" within the definition of '
sale" in Section 201(d) because (a) the Navy resell
rate, principally to Navy personnel, civilian emplo
concessionaires at a housing development located o
reservation; (b) only 25 percent of the amount sold to
by the Company was delivered to those customers; a
Company's former contract with the Navy made no
to resale by the Navy and the Company does not int
for resale. Here again the Company's objections wil
to lack substance.

a. The Navy Makes "Resales" of Energy Sold to It by the C

Regardless of who the Navy's purchasers are, wh

ier they are regulated by any other agency, on the rec-
whole the Commission was clearly warranted in finding
h energy "is resold to ultimate consumers and consumed
ada" (R. 107). The responsible civilian official and
fficer testified to such resales (R. 270–279, 288–291,
), testified that they were metered deliveries made
ritten contracts, typical examples of which were pro-
s exhibits and made part of the record (R. 541–552), at
1½ cents per kwhr.[32] Typical examples of the receipts
r payment were also produced as exhibits and made part
ecord (R. 553–554). That these are "sales" as much
made by the usual local electric utility appeared fur-
m the testimony that the only reason the service
rendered by the local electric utility (Mineral County)
latter's financial inability to undertake the business
293). All of this evidence was uncontroverted.
Company's argument (Co. Br. 65–66) that the purpose
II was limited to enabling "State agencies to start with
holesale rate in regulating the local distribution rate"
t II should, accordingly, be held inapplicable because
y's local distribution rate is not regulated by a state
is not supported by any citation of authority. Ob-
the Company has cut its coat to fit its cloth. The
on is in conflict with the Commission's consistent in-
tion of the rate regulatory provisions as being intended
enefit of consumers, including those served by munici-
ibuting utilities, which are usually not regulated by
encies (*supra,* pp. 20–24). It also ignores the fact that
me of the enactment of Part II in 1935, even privately
ocal distributing utilities' rates were not subject to
on by state agencies in seven states,[33] yet it would

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verage monthly consumption by tenants in the Babbit public
uarters was 182 kwhr (computed from R. 539) for which the
d $2.73. At Las Vegas, Nevada, he would pay $3.47, Boulder City,
3.62, and Henderson, Nevada, $3.48 for the same amount. But
hr he would actually pay less at each of the other three Nevada
the Navy charges. These comparisons are made from figures

subject to Commission jurisdiction in those seven stat
finally, in arguing that federal regulation of the rat
the Navy "would be of no effect whatever" because
tary authorities may charge any rate "they desire"
66), the Company wholly overlooks the basic fact
public interest in the Company's rate to the Navy is
tially the same, whether the burden of excessive r
to fall first on the ultimate consumers of that ener
rectly on the taxpayers.

b. Resale of an Indistinguishable 25 Percent of the Energy Sold Commission Regulation of the Sale

The Company argues (Co. Br. 66) that it is imp
see why sale of the 25%[34] resold by the Navy should n
Commission regulation on the theory that the 2
its identity in the 75% which is not resold, and the
the larger percentage should determine the treatme
whole.

Here again the Company's objection is basically a
one, having been raised in some form and at some
practically every proceeding in which the Commissio
diction under Part II has been contested. The "pu
ities" brought under Commission regulation by Pa
typically companies whose income is derived predo
from ultimate consumers and intrastate sales; the en
handle is often predominantly energy produced and
in the same state, with an indistinguishable admixture
state energy; their sales of energy moving interst
include indistinguishable admixtures of energy movi
intrastate; and the facilities found to be jurisdictiona

[34] The Company's figure of 25 percent is apparently a roundi
percent shown by R. 270, for the year 1949. (The Commissio
percentages ranged from 15.4 percent to 28.6 percent for the ye
1948, inclusive, in parts of findings, R. 90, 105, not objected
114–115.) That evidence shows that the 24 percent does not in
properly attributable to that 24 percent and we believe the
not show what those losses were. In this connection we ma

ixtures. Attempts have been made to ground ob-
o various forms of Commission regulation on such
But in no instance where the Commission has asserted
on in the face of such an objection has the objection
ained by the courts. Where the courts' opinions
ed the objections they have overruled them. *Jersey*
. & L. Co. v. *F. P. C.*, 319 U. S. 61, 66–67, *affirming*
183, 186–189 (C. A. 3) (where the energy flows are
y described); *Connecticut L. & P. Co.* v. *F. P. C.*,
515, 535–536; *Hartford E. L. Co.* v. *F. P. C.*, 131
3, 958 (C. A. 2), *certiorari denied*, 319 U. S. 741;
ania W. & P. Co. v. *F. P. C.*, — F. 2d — (C. A. D. C.
36, 10,239, 10,531), decided July 3, 1951 (slip sheet,
3), *certiorari granted*, February 4, 1952. See also
Natural Gas Corp. v. *P. S. C.*, 119 F. 2d 417 (C. A. 6)
28 F. Supp. 509 (D. C. E. D. Ky.). This unvaried
cisions is consistent with the earlier decisions denying
sdiction over sales of *mixtures*.[35a]

l take space to discuss only two of these cases. In
ecticut L. & P. case, *supra*, the Commission found that

Kansas Gas and Electric Company, 1 F. P. C. 536, 543–544, 26
9; *Hartford Electric Light Company*, 2 F. P. C. 359, 365–366,
193, *affirmed*, 131 F. 2d 953 (C. A. 2), *certiorari denied*, 319
Chicago District Electric Generating Corporation, 2 F. P. C. 412,
NS 263; *Connecticut Light & Power Company*, 3 F. P. C. 132,
PUR NS 170, *set aside on other aspects*, 324 U. S. 515; *Safe*
ter Power Corporation, 5 F. P. C. 221, 235, 66 PUR NS 212,
9 F. 2d 179 (C. A. 3), *certiorari denied*, 339 U. S. 957; *Pennsyl-*
& Power Company, 8 F. P. C. 1, 12–17, 82 PUR NS 193, *affirmed*,
— (C. A. D. C. Nos. 10,236, 10,239, 10,531), decided July 3, 1951,
granted, February 4, 1952; *Florida Public Utilities Company*,
189, issued January 25, 1950, pp. 11–15 (mimeo.); *Arizona*
pany, Inc., Opinion No. 190, issued March 31, 1950, pp. 6–7, 9,
), 84 PUR NS 3; *Western Light and Telephone Company, Inc.*,
199, issued September 20, 1950, pp. 1–3 (mimeo.), 87 PUR NS
nsin Michigan Power Company, Opinion No. 213, issued June
6–10 (mimeo.), 89 PUR NS 97, petition for review filed C. A. 7
4, 1951.

ri v. *Kansas Gas Co.*, 265 U. S. 298; cf., *P. U. C.* v. *Landon*, 249
While those sales, both made in Kansas, consisted principally

its ownership and operation, in addition to three o
of facilities, of a 14-mile, 33 kv transmission line
tenances, running from Montville on the west
Thames River above New London to Groton Long P
east side of the river at its mouth, all in the State o
cut. There it had sold an average of 4,634,212 kwh
a year[36] to the Borough of Groton. The Borou
resold an average of 1,368,412 kwhrs a year, or 29
its purchases, to a privately owned utility which
it by submarine cable under Fishers Island Sound
Island, New York, and there distributed and resol
mate consumers. The Commission held that the 3
mission line was a facility for transmission of elec
in interstate commerce. The Company objected c
of the relatively small amount of interstate energ
which it sought to emphasize by comparing to the
total system energy. Although the Supreme Cou
the Commission's order on other grounds, it rejecte
tention (324 U. S. at pp. 535–536):

> Another contention made by the Compa
> shortly disposed of. It is contended that th
> energy passing over certain of these facilit
> nificant in proportion to the total. Only
> fifth of one per cent of all the energy receiv
> erated by the Company throughout th
> Connecticut was transmitted out of the state
> time of the connection of Fishers Island wi
> ough of Groton. Congress appears to have
> Commission's sound administrative discreti
> mine whether or not to assert its authority i
> ations. Congress annually receives a report
> mission's work and appropriates the fu
> continuance. If it thinks the Commission
> tending its attention to trivial situations i
> means of control in its hands. The wisdom
> is not our concern, but only its legal justific

n of the Commission upon any particular volume or portion of interstate energy involved, and we do not nk it would be appropriate to supply such a jurisdic- nal limitation by construction.

Penn Water case, *supra,* the petitioners objected to nission's order, insofar as it regulated Penn Water's ree Pennsylvania utilities, that not over 17 percent rgy delivered to those utilities had originated out of that the sales of the total should, therefore, be held state regulation and outside the Commission's rate n.[37] The Court of Appeals rejected the objection in of its opinion cited above on the ground that the iginating out of state was electrically and economi- stinguishable from that originating within the state vered.

dence in the present case is likewise plain and uncon- that the energy resold by the Navy is indistinguish- the rest of the energy in the sale to the Navy The "services * * * have always been lumped one bulk sale," according to the voluntary stipulation ny counsel (R. 273). In fact, to distinguish it would separate, parallel transmission line from the delivery Hawthorne, 50 miles distant, so that one line could be rry the resale load exclusively (R. 313).

Provision for Resale Is Unnecessary to Constitute the Sale a "Sale for Resale"

mpany argues (Co. Br. 67) that its sale to Navy is for resale because it "has never agreed to sell energy for resale * * *," and cites part of a dictionary quoting Kipling in an effort to establish that contract ent or Company intention that the energy shall be equired.

gain, the cases are against the Company, particularly f the fact of its knowledge of the transmission out of resale (knowledge found by the Commission in parts

R. 114–115). *Jersey Central P. & L. Co.* v. *F. P. C.*, 3
61, 68–73; *Hartford E. L. Co.* v. *F. P. C.*, 131 F. 2d 953,
(C. A. 2), *certiorari denied*, 319 U. S. 741.

D. These Sales Are Not Excepted as Sales Made Local Distribution"

Thrown in with the Company's contentions which h
considered, above, is another familiar argument: th
sales are not within the Commission's jurisdiction be
the Section 201(b) exception from Commission jurisd
"facilities used in local distribution" (Co. Br. 62–63
difficult to imagine a case in which the argument
apposite.

The Company's inadequate treatment of the point r
effort even to suggest any legal theory by which the s
exception of *facilities* is to be transmuted into an exc
sales.[38] It offers no rationalization of its attempt to
from the Commission's jurisdiction sales indistinguisha
the *Attleboro* and *Kansas Gas Co.* sales (*supra*, p. 18), a
it was the constitutional impotence of the states to
such sales which was the principal reason for the enac
the rate provisions of Part II, as we have shown (*supr*
n. 16). The Company seems to make its contention
transmission facilities here involved, which carry ene
tances up to 80 miles on the Company's system (R. 1
and fifty miles and more further on the purchasers' syst
231, 292), from isolated hydro plants to remote comm
constitute "local distribution," in complete disregard
holding of the Supreme Court in *F. P. C.* v. *East Ohio*
(338 U. S. 464, 469–470). There under parallel prov
the Natural Gas Act[39] the Court held:

> But what Congress must have meant by "fa
> for "local distribution" was equipment for dist

[38] It is an elementary rule that exceptions from a general polic
law embodies should be strictly construed. *Interstate Natural G*
F. P. C., 331 U. S. 682, 690–691; *Spokane & Inland R. R.* v. *Unit*

unity, not the high-pressure pipe lines transporting the
s to the local mains.

ermore, the Company makes no effort to reconcile its
at the 55 kv facilities here involved are used in local
ion, with its admission that exactly similar facilities [40]
mission to Nye and Esmeralda Counties, Nevada, are
o the Commission's jurisdiction (Co. Br. 6), hence not
ocal distribution.

o the Company does not even suggest any want or
cy of factual support for the Commission's findings
Company's facilities used in making these sales are
lities used in local distribution (R. 98–99, 108).
no such suggestion could be sustained in view of the
verted testimony of the Commission's engineer who
investigation and study of the facilities and their
n (R. 337). His testimony finds corroboration in the
s references showing the prevalent practice in the in-
distinguish facilities used in "distribution" from the
ilities here involved—in Company contracts (R. 589,
606, 608–609, 610–612), in the Navy "Permit" to Min-
nty (R. 522), in testimony (R. 268), and in the very
dules prescribed by the California Commission which
pany seeks to apply to these sales (R. 483–484, 485–
his evidence, too, was uncontroverted.

cluding this point we may note that the Company's
t, based on its description of the 55 kv facilities as serv-
ctly or indirectly" all of its local customers in Mono
Co. Br. 8; *cf.* 26, 62–63) would make the entire indus-
pt from regulation under Part II. For there is not a
r or transmission facility, anywhere, that does not
or indirectly" serve local customers. That is what all
ilities of electric utilities are "for." The exception is
es "used in" local distribution.

g answered each of the four claims advanced by the
y in its attempt to avoid Commission jurisdiction un-
II, we are now able to answer somewhat more

under Part I.

II

THE OBJECTIONS TO COMMISSION JURISI UNDER PART I ARE WITHOUT MERI

The Company's objections to Commission jurisdic these rates under Part I (Co. Br. 45–57) all depend upon the assumption that Sections 19 and 20 autho regulation, under the usual state regulatory statutes, state wholesale rates like those here involved, which, a already shown, in the silence of Congress are beyond stitutional power of the states under the decisions in v. *Kansas Gas Co.*, and *P. U. C.* v. *Attleboro S. & E. C* p. 18). Therefore, before undertaking to answer the lar objections advanced by the Company, we shall s whatever other doubts there may be as to this assur any state regulation of interstate wholesale rates wa ized in Part I, it was enforcement of Section 20 sta regulation by agreement of the states directly concer

We may begin with the historical fact that Sectio 20 were enacted without legislative attention being to any constitutional inability of the states to regulate electric energy sold in interstate commerce, even at w This is reflected in Sections 19 and 20 by the absen distinction, like that in Part II, between sales at whol sales at retail in local distribution. The principal d drawn in Part I is that between sales (both at retail a sale) in which the power enters interstate commerce, Section 20 applies, and all other sales which are left s Section 19. Upon this distinction two differences ha we shall discuss below: Section 20 contains a substa vision, not found in Section 19, that interstate rates a "shall be reasonable, nondiscriminatory, and just and all unreasonable discriminatory and unjust rates c are hereby prohibited and declared to be unlawful"; S also provides that "whenever any of the States dire

r such States are unable to agree through their prop-
uted authorities on the services to be rendered or
s or charges of payment therefor, * * * juris-
ereby conferred upon the commission * * * to
provisions of this section * * *."

aking up those provisions, it should be noted that
cisions which pointed up the constitutional restric-
ate commission power to regulate wholesale rates
e commerce had not been handed down at the time
inal enactment of Part I in 1920. There was of
commerce clause itself with its well known genesis
pose to prevent individual states from regulating,
efit of their several interests, *e. g.*, as producer or
states, or as competitor states, "commerce which
ore states than one." [41] There was also *The Daniel*
10 Wall. 557), establishing that even an intrastate
interstate journey is subject to Federal regulation.
) state utility regulation of local retail distributing
rates for natural gas originating out of state, where
under the commerce clause, had been upheld con-
P. U. C. v. *Landon*, 249 U. S. 236; *Pennsylvania*
P. S. C., 252 U. S. 23.

v. *Kansas Gas Co.* (265 U. S. 298), which was to
tate wholesale rates for natural gas to be outside
r, was four years in the future. And *P. U. C.* v.
. & E. Co. (273 U. S. 83), which would for the first
to a focus the problem of the constitutional inability
es to regulate interstate wholesale rates in the elec-
industry, lay seven years in the future.

ing Sections 19 and 20 Congress was, therefore, not
itself to any problem calling for the vesting in the
ower constitutionally withheld from them in the

. *Ogden*, 9 Wheat. 1, 194, 224–225; see *United States* v. *South-*
erwriters Asso., 322 U. S. 533; Stern, That Commerce Which
re States Than One, 47 Harv. L. Rev. 1335, 1361; II Farrand,
of the Federal Convention (Rev. Ed. 1937) 308, 441; III
478, 519, 547, 548; The Federalist, No. XXII (Everyman's

whatever power they had, making clear that federa
were not, by virtue of their status as federal licensees,
from state regulation.[43]

This is shown very clearly by the testimony, in t
Committee hearings, of Mr. O. C. Merrill, prese
views of the Administration on behalf of the Admi
bill.[44] Mr. Merrill's testimony is clear that the Ac
tion, in proposing the bill, assumed that the states c
late all the rates involved in Section 20, and that
was intended to be "left" with the local authorit
extent they had the power of regulation, and not
thorized beyond that.[45]

But Congress perceived that, even as to regulatio
rates for interstate energy in local distribution, as
the state regulatory jurisdiction was clearly establ
interests of the states directly concerned might be in
each state wanting as much of the benefits from low c
electric generation as possible for its own citizens, i
or another (*infra,* pp. 54–55). Against that likelihoo
haps as well against any possibility of constitution
regulatory power in the states over other interstate r
gress provided in Section 20 the standard which shou

---

[42] Contrast the clear manifestation in other statutes of C
purpose affirmatively to permit application of state authority
transactions constitutionally withheld, in the silence of Cong
Rahrer, 140 U. S. 545, 549, 562; *Clark Distilling Co.* v. *Weste*
Ry. Co., 242 U. S. 311, 321, 332; *Whitfield* v. *Ohio*, 297 U. S. 4
Kentucky Whip & Collar Co. v. *I. C. R. Co.*, 299 U. S. 334, 34
dential Life Insurance Co. v. *Benjamin*, 328 U. S. 408, 429–431.

[43] See *Broad River P. Co.* v. *Query* (288 U. S. 178, 180) for a
tention by a licensee that as such it was exempt from state

[44] Mr. Merrill's testimony is quoted in the Commission's opi
Harbor Water Power Corporation (5 F. P. C. 221, 240–242.
212 (1946), *affirmed*, 179 F. 2d 179 (C. A. 3), *certiorari denie*
957). Inasmuch as the Commission's order here under revie
that *Safe Harbor* opinion and "reaffirms" the conclusion th
(R. 95), we have printed the relevant portion as Appendix A
(*infra,* pp. 47–58).

[45] The Company's discussion of Right of Way Acts and D
Regulations prior to 1920 (Co. Br. 27–30) discloses no re

ncerned to administer and enforce that standard by
, if they could do so effectively, and provided that
ld not, the Commission should.

· that agreement was conceived to be one made under
ct clause of the Constitution (Art. 1, Sec. 10, Cl. 3)
rely clear. The only Court that has had the ques-
ıted to it for decision has held that it was. *Safe*
P. Corp. v. *F. P. C.* (124 F. 2d 800, 807–808 (C. A.
ıri denied, 316 U. S. 663). On the other hand, the
nal approval is not consistent with the practice of
n giving express and formal approval to interstate
[6] and is, in fact, found only in the implication of
phrase "or such states are unable to agree." Fur-
if Congress intended to give its approval under the
lause (Art. 1, Sec. 10, Cl. 3), it was thereby confer-
er upon the states to do by such agreements what
idually did not have power to do—which was more
Merrill's testimony indicates the Administration in-
proposing the language.[47]

vever that may be, two things at least are clear from
g of Section 20 as to the state action therein contem-
) It is the service and rate standard of Section 20
be "enforced"—not a state law standard as in Sec-
nd enforced by a "commission or other authority"
y a state for the purpose of enforcing that standard
est of Section 20); (2) The enforcement of that
ıust be the result of agreement upon that enforce-
"properly constituted authorities" of each of the
ctly concerned.

, *Olin* v. *Kitzmiller*, 259 U. S. 260, 262; *Arizona* v. *California*,
, 449; *cf., United States* v. *Arizona*, 295 U. S. 174, 183; see also
Natural Gas Act, 52 Stat. 821, 827, 15 U. S. C. §§ 717, 717j.

Congress is to be deemed to have been acting in the exercise
utional power with respect to the territory and property of the
s (Art. IV, Sec. 3), as the Company contends (Co. Br. 37), or
e clause seems largely academic. For Sections 19 and 20
nsees whose projects are located on or affect navigable waters

Commission action. *Safe Harbor W. P. Corp.* v. *F* F. 2d 179, 191–193 (C. A. 3), *certiorari denied,* 339 Equally clearly, "agreement" by a state agency, s Nevada Public Service Commission in this case, whic charged by the State of Nevada with no responsibi thority of any kind whatever as to the regulation o pany's rates here in question,[48] would be completely less. It would have no more legal effect than "agre a state board of medical examiners. As the Third C in the first *Safe Harbor* case (124 F. 2d at p. 806): " intention of Congress that there should be regulatio trol of hydroelectrical energy and not that impot bodies would be set up by the states to go through t of regulation."

Thus, Section 20, by stipulating inability to agree state agencies as the condition precedent to Commi lation, made plain that the state regulation intended lation by the states directly concerned as equals, assuming the prerogative of regulation, and the oth of petitioners or protestants before it, as the Compan (Co. Br. 46–48).

Corroboration of the foregoing interpretation is a the history of the 1935 amendatory legislation. No there appear any evidence of a belief by Congress in the Federal Water Power Act had conferred any p individual states over interstate wholesale rates, or, i the states had any power from any source over any On the contrary, it repeatedly appears that Congres in Part II to confer jurisdiction over all interstate electric rates, as having been "placed * * * e yond the reach of the States" by the *Attleboro* cas Rep. No. 621, 74th Cong., 1st Sess., p. 17). Nowh reference to that subject in the legislative history o Act have we found any statement or inference that

[48] The Commission found (R. 93–94) that the Nevada Com no statutory power or responsibility with respect to the fixing

ges under Part I.

is understanding of Section 20 we may turn to the objections which the Company urges.

ommission Properly Found That Section 20 Was Applicable

mewhat casual reference [49] the Company seeks to ome objection to jurisdiction under Section 20 that does not "enter into interstate commerce", presumse, as it had urged with respect to Part II, the purandling of the power must be deemed nonexistent ion 201(f). This objection is answered, if answer y, by what we have already said (*supra*, pp. 16–17). er objection to the applicability of Section 20 seems cit in the Company's objection that the Commission noring Section 19 and in not finding these rates subifornia Commission regulation under that Section 6–17, 32, 45). But we think it plain from what we dy said that Section 20 carves an exception from of all cases in which the power enters interstate Hence, if the Commission was correct in finding ower here sold does enter interstate commerce, as we dy shown, the Commission properly treated Section mmediately applicable Section directly involved, so I is concerned.

ommission's Findings Supporting Its Assertion of tion Under Section 20 Were Correct and Fully t

npany also objects to the Commission's findings with its jurisdiction under Part I, contending that "There of properly qualified state commissions in this case

pany only says (Co. Br. 46): "Assuming that interstate comolved (*which Petitioner denies*) it is only necessary (etc.) lsewhere it seems to have conceded the point in formally speci- (Co. Br. 17): "F. P. C. erred, *after finding* [Finding 14; R. 1081

Br. 17), and also seeks to question the adequacy of th
ing of one of the findings (Co. Br. 21).

To be qualified to effectuate the state regulation
plated by Section 20 for these rates there would at leas
be a commission or other authority properly consti
the State of Nevada with power to agree with a co
or authority of the State of California on the enforc
Section 20, as we have shown (*supra,* pp. 36–37). Th
ing of Section 20 as requiring a state authority havin
such power is neither "bizarre" (Co. Br. 52) nor "str
unheard of" (Co. Br. 53) is suggested by the fact that
court cases [50] in which licensees have heretofore clai
state commissions have jurisdiction under Section 20, h
cases which involved the Pennsylvania and Maryla
missions. Both of those Commissions have expres
given such power by their respective state statutes.[51]

Here it is clear that the Nevada Commission is n
tuted with any responsibility or power of any kind a
lation of the Company's rate to the Navy or Minera
(*supra,* p. 6). The Chairman clearly so indicated

[50] *Safe Harbor W. P. Corp.* v. *F. P. C.*, 124 F. 2d 800 (C. A. 3)
denied, 316 U. S. 663; *Safe Harbor W. P. Corp.* v. *F. P. C.*, 17
(C. A. 3), *certiorari denied*, 339 U. S. 957; *Pennsylvania W. & P. C*
— F. 2d —, (C. A. D. C. Nos. 10236, 10239, 10531) decided Ju
certiorari granted, February 4, 1952.

[51] Pennsylvania Public Utility Law, Section 913(a), reads
"The commission shall have full power and authority to make jo
gations, hold joint hearings within or without the Commonwealth
joint or concurrent orders in conjunction or concurrence with
board, commission, or agency of any state or of the United Stat
in the holding of such investigations or hearings, or in the mak
orders, the commission shall function under agreements or compa
states or under the concurrent power of states to regulate the
commerce, or as an agency of the Federal Government, or

Maryland Public Service Commission Law, Section 348, reads
"The Commission shall have full power and authority to make jo
gations, hold joint hearings, and issue joint or concurrent ord
junction or concurrence with any official board or commission of
of the United States, whether in the holding of such investigatio
ings or in the making of such orders the Commission shall fun

246) and the Company points to nothing in the record Nevada Constitution, statutes or decisions as showing ary. The fact so strenuously urged by the Company 50–51), if it is a fact,[52] that the Nevada Commission vered to pass on the rates which Mineral County ts customers in Hawthorne, Luning, and Mina, Necourse has nothing to do with the existence of any au- participate by agreement or otherwise in regulation tes here involved.[53] The Company as much as says t refers to the Nevada Commission as not "being auto operate extraterritorially" (Co. Br. 52), although t with the California Commission upon that Commisorcement of Section 20 as to these rates involves nothnd Nevada's power as "extraterritorial," if authorized mpact clause (Art. 1, Sec. 10, Cl. 3) of the Federal ion. The Commission was, therefore, abundantly d in finding as it did in its opinion here (R. 95), which porated in and made a part of its order (R. 103):

It is apparent that the Public Service Commission of evada is without authority with respect to rates arged Mineral County or the Navy, and therefore nnot be regarded as a "commission or other authority enforce the requirements of" Section 20, and it fols that no further showing is required to support the nclusion that it is *impossible for a properly constited authority of Nevada to agree with the California ommission* concerning the rates charged Mineral unty and the Navy.

gal sufficiency of this factually uncontested finding to the conclusion that the Commission has jurisdiction

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o the hearing in this case neither the Nevada Commission, the eneral of Nevada, nor Mineral County were of that opinion or vised, R. 244–249.

mpany's suggestion (Co. Br. 54) that if Mineral County pays rate for the energy it purchases from the Company the Nevada n could refuse to allow Mineral County to charge its customers

ther argument from a mere comparison with the rel
tion of Section 20:

> * * * and whenever any of the States dir
> cerned has not provided a commission or other
> to enforce the requirements of this section w
> State * * * or such States are unable
> *through their properly constituted authorit*
> services to be rendered or on the rates or charg
> ment therefore * * * jurisdiction is he
> ferred upon the Commission, upon complaint c
> son aggrieved, * * * or upon its own in
> enforce the provisions of this section * *

The Company argues (Co. Br. 21) that it was insu
the Commission to find, in Finding No. 16 (R. 108)
rates "are subject to regulation in accordance with
sions of Section 20." The Commission should have
Company says, the words: "by the F. P. C." But ev
lation *by the Commission* is not adequately implied b
No. 16 in the context supplied by Findings Nos.
(that the power enters interstate commerce, that Nev
of the "States directly concerned," and that Nevad
provided a regulatory commission or other authority
the requirements of Section 20 as to these sales), it i
by the Commission's discussion of "our jurisdictio
Part I in its Opinion (R. 92–96), which is expressl
part of the order (R. 103). In any event the Compa
cluded by Section 313 (b) from urging this objection
did not urge it in its application for rehearing before
mission (R. 119–120) when any deficiency in phra
have been easily cured. *Panhandle Eastern P.*
F. P. C., 324 U. S. 635, 649, 650–651.

MISSION PROPERLY REQUIRED THE RATES IED IN THE SPECIFIED CONTRACTS TO BE AND ADHERED TO

the Commission's order here under review as re-nstatement of "contracts which, by or pursuant to , have terminated" (Co. Br. 68), the Company says: *arguendo* that jurisdiction existed, this phase of was arbitrary, irrational and unsupported by law" 0). It goes on to say: "The only proper order in e would be one in the alternative, either to file ase and desist from the service. If rates were then appeared unfair or unreasonable, FPC could have under Section 205(e) to suspend the rates and enter ring" (*ibid.*).

order plainly does not read as the Company treats s not require reinstatement of the contracts. It ly to the rates on file (or which should have been d merely directs the Company to do that which it ed to do by the Act, and by regulations thereunder e not been questioned. As the Company's counsel greed (R. 223): " * * * in this hearing we ing that it is an unfair rate."

o consider the rate to Mineral County first) the s ordered not to charge Mineral County any rates n those reflected in filed Rate Schedule FPC No. nd unless such schedule is duly superseded by a pported new filing or by a rate prescribed by Com-der" (R. 110–111, *supra,* p. 1). "Rate Schedule 5" is the designation given by the Commission to ny's contract with Mineral County (R. 404) which, ny says, had expired by its terms. That contract iled under Section 205(c) of the Act and Section of the Regulations and designated as "Rate Sched-

R. § 35.3(a): *"Obligation to file.* Every public utility shall with the Commission full and complete rate schedules clearly

of course, are definitions of the service to be ren
the method of computing the consideration to b
that service. Those definitions constitute the "rat
by filing the contract, where there is only one or
customers for the service in question, a company con
with the requirement that it file its rates and tha
contracts affecting or relating to its rates (Section 2

Although the private contract rights and obliga
limited to the three-year term of the contract (sub
effect of paragraph 5 of the contract (R. 408) wh
the contract subject to filing in accordance with the
Rules and Regulations of the Commission) the *rate*
rate, was terminable only by filing and posting a
cancellation as provided in Section 35.5 [55] of the Re

---

such rates, and all contracts which affect or relate to such ra
classifications, or services as required by section 205(c) of
Power Act (49 Stat. 851; 16 U. S. C. 824d(c)). Where two o
utilities are parties to the same rate schedule, each public ut
ing service, transmitting, selling, pooling or interchanging el
shall post and file such rate schedule, or the rate schedule ma
one such public utility and all other parties having an obli
may post and file a certificate of concurrence on the form
§ 131.52 of this chapter."

[55] 18 C. F. R. § 35.5: "*Notice of cancellation.* When a rate s
charge, classification, or service, or any rule, regulation, or c
ing thereto and on file with the Commission is proposed to be
no new rate schedule is filed in its place, except as in this p
each public utility required to file the schedule shall formal
Commission of the proposed cancellation on the form indicated
this chapter at least 30 days prior to the proposed effective
cancellation; and shall therewith submit a statement showing
therefor and that notice has been served upon each utility th
to the rate schedule. A copy of such notice to the Commis
duly posted. For good cause shown, the Commission may per
cancellation to be filed within less than 30 days of the prop
date thereof."

[56] If, under the facts of a particular case, the term of th
deemed to be a part of the definition of the service or consi
therefore part of "the rate," it yields to regulation. For it
held that private contract rights must yield to public autho
constitutional interdiction of statutes impairing the obligation
does not prevent a regulatory commission from abrogating pri

hanged, under Section 205(d) of the Act and Sec-
)[57] of the Regulations only by duly filing a changed
Company had first attempted to file a changed rate
ithdrew its incomplete submittals (*supra*, p. 4).
ently, the rate embodied in the contract continued
led rate and as such continued to be the only legally
e rate. *Montana-Dakota U. Co.* v. *Northwestern*
41 U. S. 246, 251. The service continued to be ren-
the claimed expiration of the contract, but the Com-
and collected therefor amounts in excess of the filed
n, under protest (R. 641), was paid by Mineral
ecause it had no alternative source of energy (R.
doing so the Company had violated, and continued
Sections 205(d) and 20 of the Act and Sections
5.2,[59] and 35.20[60] of the Regulations. Clearly, it
reason of its violations derive the advantage[61] of

Co., 300 U. S. 109, 113–114; *Union Dry Goods Co.* v. *Georgia*
e Corporation, 248 U. S. 372, 375–377; *cf.*, *F. P. C.* v. *Natural*
Co., 315 U. S. 575, 582.

R. § 35.3(c): "*Changes in filed rates, charges, etc.* All rate
king a change in any rate, charge, classification, or service on
Commission, or in any rule, regulation or contract relating
be posted and filed with the Commission not less than 30 days
roposed effective date thereof, unless a shorter period of time
by the Commission; and as to each proposed change there
itted to the Commission: * * *"

57, *supra*.

. § 35.2: "*Effective rates and charges.* No public utility shall
lirectly demand, collect, or receive, for the transmission or sale
ergy subject to the jurisdiction of the Commission, or for the
ation of any facilities subject to the jurisdiction of the Com-
rate or charge different from that prescribed in its rate sched-
les actually on file with the Commission, unless the Commis-
good cause shown, otherwise provide by order."

R. § 35.20: "*Filing.* Every licensee shall file with the Com-
l and complete copy of every rate schedule, tariff, contract, or
id all supplements thereto, providing for the sale at wholesale
consumption, resale, or any other use whatsoever by the pur-
ctric energy or mechanical horsepower generated or developed
acilities of the licensed project: *Provided, however*, That rate
ntracts, agreements, etc., filed pursuant to the provisions of

mission's power of suspension under Section 205(e)

Under Sections 205(c) and 20, as well as to "ca provisions" of the Act as contemplated by Sectio Commission was, therefore, clearly warranted in f 109) that it was "reasonable and appropriate" to Company to cease and desist from charging any rate the last duly filed, uncanceled, and unchanged rate As the Supreme Court said of the company in the *Dakota U. Co.* case (*supra,* p. 43): "It can claim n legal right that is other than the filed rate * *

As to the rate to Navy, the Company is in no bett from the fact that its violations of the applicabl quirements have continued for a longer time. It ha and continued to be in violation of Sections 205(c) the Act and Sections 35.2,[62] 35.3(a) [63] and 35.20 [64] o by not filing the Navy rate. It sought to change it gally, in violation of Sections 205(d) and 20 by b higher rate, which it did not file. The service contin paid for at the old rate (*supra,* p. 5). The highe therefore no more than something the Company w (unsuccessfully as a matter of fact, and ineffectively of law [65]) to bring about, and the old rate continue rate actually collected at the time of the Commissi The Commission was therefore fully justified unde 205(c), 20 and 309 in ordering the Company to fi previously contracted for and being paid at the ti cease and desist from charging any other than a duly

IV

THE COMMISSION'S RULINGS ON ADMISSIB EVIDENCE AND REFUSAL TO REOPEN THE WERE CORRECT

The Company objects (R. 18–20) to the Trial I receipt in evidence (R. 189) of a letter opinion of th

[62] See note 59, *supra,* p. 43.

vidence (R. 111–112) of a letter of the Nevada Com-
R. 247–248); also to the Commission's denial (R. 147)
mpany's motion (R. 126), at the time of its applica-
ehearing, to reopen the record for the purpose of
another letter opinion (R. 129) of the Attorney Gen-
vada.

t opinion of the Attorney General as to the jurisdic-
e Nevada Commission over municipal corporations
14) and the letter of the Nevada Commission advis-
er customer (R. 248–249) of Mineral County Power
at the Commission had no jurisdiction over the Min-
ty Power System (R. 247–248) both related to the
estion of the position actually taken by that Commis-
its jurisdiction over Mineral County, and the basis
Testimony concerning that had already been re-
n witness Parker without objection (R. 244).

Q. Have you been officially advised as to whether the
vada Public Service Commission has any jurisdiction
h respect to the rates charged the Mineral County
ver System?

A. Yes. Mr. J. G. Allard, Chairman of the Nevada
blic Service Commission, informed me that his Com-
sion has no jurisdiction with respect to electric rates
ler the statutes of Nevada.

more, it is clear from the Commission's opinion and
at the Commission did not rely on either letter as a
s decision, for its decision deals only with the ques-
e Nevada Commission's statutory responsibility or
o the rates charged Mineral County and the Navy
npany, not Mineral County's retail rates, as we have
pra, p. 39). If the admission of either letter had
eous, it would have been clearly non-prejudicial.
the Commission's order cannot be invalidated for
such evidence in any event, in view of the provision
308(b) that the technical rules of evidence need not

erroneous. Not until a year after the hearing
March 21, 1950, briefs having been filed in May, Jun
1950 (R. 14), and the Commission order and opin
April 13, 1951 (R. 102, 112), did the Company o
1951 (R. 138) move (R. 126–127) to reopen the re
ceive in evidence an opinion of the Attorney General
dated April 24, 1950. The motion contained no al
showing that the opinion could not have been produ
the briefs were filed, the Examiner's Decision and
thereto, or the Commission decision. Furthermore
of the opinion makes clear that it could have had
upon the position previously taken by the Nevada C
as to its jurisdiction. The denial of the motion wa
clearly not erroneous.

Moreover, the opinion is of a purely legal natu
the same questions as to the Nevada Commission's j
over Mineral County's retail rates already shown t
vant to the Commission's decision, and the Commis
its denial on the ground of such irrelevancy (R. 147
of the motion, even if erroneous, could not have be
cial, and clearly constitutes no basis for setting aside
mission's order.

CONCLUSION

For the foregoing reasons the Commission's order
affirmed.

Respectfully submitted.

BRADFORD ROSS,
General Counsel,
HOWARD E. WAHRENBROCK,
Assistant General Counsel,
Counsel for Respond
Federal Power Commission, Washington

Of Counsel:
LEONARD EESLEY,
FRANCIS L. HALL,

APPENDIX A

om the opinion of the Federal Power Commission, *rbor Water Power Corporation,* 5 F. P. C. 221, 6 PUR NS 212, *affirmed* 179 F. 2d 179 (C. A. 3), *certi-ied,* 339 U. S. 957 (referred to in the opinion part of here under review, R. 93, 95):

* * * *

Tarbor, as a "licensee," excepted from the provisions
—Although it owns and operates facilities subject to tion of the Commission under Part II, which bring [236] within the definition of a "public utility," r argues that it should be excepted from the defini-ffect, it seeks to have us construe section 201 (e) as A 'public utility' is any person who owns or operates bject to the jurisdiction of the Commission under *ept licensees."*

pts to support its contention for an implied excep-uing that such an interpretation gives proper effect lause of the declaration of policy in section 201 (a). ation, in its entirety, reads as follows:

is hereby declared that the business of transmitting selling electric energy for ultimate distribution ie public is affected with a public interest, and that eral regulation of matters relating to generation to extent provided in this Part and the Part next fol-ng and of that part of such business which consists e transmission of electric energy in interstate com-e and the sale of such energy at wholesale in inter-commerce is necessary in the public interest, *such ral regulation, however, to extend only to those mat-which are not subject to regulation by the States.*[8] ics supplied.]

g upon the clause, "* * * such Federal regulation, how-

Harbor contends, are the interstate rates of "licensee
it says, are subject to the authority of the States di
cerned, to regulate under section 20 of Part I. We ca
either that the last clause of the declaration of policy
201 (a) warrants reading an exception into the un
provisions of the Act, or that the State regulation re
that clause was intended to include the interstate
rates of "licensees."

The only judicial utterance in point which has c
attention, is opposed to Safe Harbor's contention
"licensee," it is impliedly excepted from the defi
"public utility" in section 201. This is found in a
the opinion of District Judge Bard (*Safe Harbor W
Corporation* v. *United States, et al.*, 37 F. Supp. 9
E. D. Pa.), subsequently quoted by the Circuit Co
peals for the Third Circuit (*Safe Harbor Water H
poration* v. *Federal Power Commission*, 124 F. 2d 80
4 at p. 804):

> Part II, as added in 1935, gives the Commi
> diction over the transmission and sale of ele
> wholesale in interstate commerce, whether
> licensees.

We feel that we should not read into the Act's clea
of "public utility" the implied exception for which S
contends, because we do not believe Congress intend
the question [237] of the coverage of Part II of the
uncertainties of implied exceptions. We think this i
by the fact that exceptions which were intended b
were expressly stated in subsection (f) of section 201
have heretofore construed most liberally.

Nor do we perceive any adequate explanation of
gress, in providing for the regulation of the rates

Light & Power Company v. *Federal Power Commission*, 324 U
said that it is "* * * one of great generality. It cannot n
and specific grant of jurisdiction, even if the particular grant
sistent with the broadly expressed purpose. But such a declar

vhich are not "licensees" and excepted those "public vhich happen also to be licensees." If, on the other gress had intended to except any "public utility's" wholesale rates, and subject them to regulation by compact, there appears no reason why it should not so for all "public utilities," but there is no pretense ess has done that.

aining doubt that we should reject the claimed ex- a "licensee" from the definition of a "public utility" by an examination of the legislative history of the resentative Rayburn, Chairman of the Committee ate and Foreign Commerce, in reporting the bill for nittee, explained why the prohibition in section s directed against personal profit of officials and f "public utilities" without also naming "licensees," that "licensees" having the requisite qualifications be "public utilities":

he Senate bill includes *licensees* within the provi- s of this section, but inasmuch as *such licensees when rstate operating public-utility companies will be ject to the provisions of the section in any event, nsees have been omitted* from the bill as reported, use of the lack of public interest in those companies ch are not public utilities.[9] [Italics supplied.]

efore, conclude that Safe Harbor owns and operates ubject to the jurisdiction of this Commission under at it is not excepted as a Part I "licensee" from the of Part II of the Act; and that it is a "public utility" he provisions of that Part for the regulation of rates. s us to a consideration of the effect of the rate pro- both Parts on each other where, as here, there is in- mpany subject to both.

ensee-public utility" subject to regulation by this n under the rate provisions of both section 20 and

. *No. 1318, 74th Cong., 1st sess., p. 31.* The conference report

interpreted the condition in section 20, "readin
ever * * * the States directly concerned *
unable to agree * * * on the rates," as conveyi
gressional consent to regulation of those rates by
compact. *Safe Harbor Water Power Corporation
Power Commission,* 124 F. 2d 800, 808. In the pres
case, Safe Harbor seizes on that interpretation to ma
gument which we have already considered and
namely, that the language in section 20 precludes th
of jurisdiction by this Commission under Part II,
constitutes authorization for the States to regulate th
interstate compact. On the other hand, Commissi
contend that such conflict requires that the provision
20, as so interpreted, be deemed repealed by implicat
enactment of Part II in 1935, so far as applicable to a
public utility." A necessary alternative to the latt
tion is that the interpretation of section 20 which gi
the conflict should be avoided if possible.

This conflict was not presented and passed on by
in the former proceeding for the reason we have alrea
out, *i. e.,* that there, Safe Harbor had not been fou
"public utility," and no assertion of jurisdiction und
had been made by this Commission. Hence, no q
our powers under Part II, or conflict thereof with th
ment of the power of the States under its interpretat
tion 20 was before the Court, as the Court recognize
declared that the matter of jurisdiction under Pa
"immaterial" (124 F. 2d 800, at p. 809):

> * * * whether or not the Federal Powe
> sion has jurisdiction over Safe Harbor as a pub
> transmitting and selling electric energy at wh
> interstate commerce under the provisions of
> the Federal Power Act, 16 U. S. C. A. § 824,
> immaterial.

In view of our finding that Safe Harbor is a "publ
as well as a "licensee," this conflict must now be c

egulate rates by interstate compact, or if the conflict voided by giving some other interpretation to that our jurisdiction over interstate wholesale rates does d on the finding that the States are unable to agree, finding is superfluous to our assertion of jurisdiction ion 20. And, of course, if it shall appear that section erly given another interpretation which avoids the at will further support our refusal to read an excep- censees" into the definition of "public utilities" in

by implication.—If there is an unavoidable conflict provision of Part I, as enacted in 1920, and a pro- the Act added in 1935, the Court's opinion in the ceeding makes clear that the later provision repeals by implication. For in another part of that same ie Court, dealing with a conflict between the provi- tion 20, for review of Commission orders by District d the provisions of section 313 (b), for review of such Circuit Courts of Appeal, held that the former had liedly repealed by the latter. Accordingly, we that if section 20 authorizes regulation of a "li- lic utility's" interstate wholesale rates by the States interstate compact, it is to that extent repealed by n by Part II.

onnection, we have noted that Mr. John E. Benton, Advisory Counsel, and for many years General So- the National Association of Railroad and Utilities ners, has gone farther and expressed his belief that the rate-making provisions of Part II, being inconsistent with the rate-making provisions of sec- implication repealed the earlier provisions." *Juris- he Federal Power Commission and of State Agencies ulation of the Electric Power and Natural Gas In-* 945), 14 Geo. Wash. L. Rev. 53, 78.

of conflict between section 20 and Part II.—We wever, believe that the doctrine of repeal by impli-

changes in the regulatory situation between 1920
suggests that no conflict exists and that section 2
II of the Act have purposes to serve which neither
standing alone.

In 1920, electric rate regulation was a matter o
local concern. In the field of electric power, th
widespread interconnection of systems across State
large scale interchanges involving sales at wholesal
was just beginning. Charges for such sales were tre
as costs in fixing rates to consumers, which was th
cern of regulatory activity.

The authority of the States to regulate rates to
for gas which had been transmitted across a State lin
established and qualified in two Supreme Cour
(*Pennsylvania Gas Co.* v. *Public Service Commissio*
23; *Public Utilities Commission* v. *Landon,* 249
But 7 years were to elapse before the Court, in *P*
ities Commission v. *Attleboro Steam & Electric Co*
U. S. 83, would declare that interstate wholesale el
are beyond the jurisdiction of the States.

Acting under these circumstances, Congress soug
with the States whatever authority they had. T
Power Commission was given authority to regula
power from licensed projects only to the extent tha
had not authorized commissions to provide the nece
lation; or, if any part of such power entered inte
merce, whenever the authorized agencies of States
were unable to agree (secs. 19 and 20). But the a
State agencies was to spring from action by the St
the limits of their own regulatory jurisdiction, whi
ognized rather than expanded by Congress.

[240] Even if advance consent of Congress to agre
tween the States must be inferred from the wo
ever "such States are unable to agree," it is entirel
sary to read into the words an expansion of State po
the grant of permission to agree on matters within

ıe Court in the later *Attleboro* decision. Accord-
e shall see, it was presumed that the existence of
ıissions, where disagreement did not render regu-
ɔrkable, would provide adequate protection of con-
licensed project power crossing State lines. Con-
fore, discerned no need to do more than provide for
ement to control and, absent such agreement, to
ıe Federal Power Commission to regulate the rates.
analysis is borne out by the legislative history of
Representative excerpts from that history, taken
earings before the Committee on Water Power of
of Representatives, 65th Cong., 2d sess., are quoted
. O. C. Merrill, presenting the views of the Secre-
ar, Interior, and Agriculture, with respect to sec-
the bill,[10] is responding to questions from several
the Committee (pp. 66, 67):

r. FERRIS. And so far as interstate business is con-
ed the power of the board to fix the rate is absolute,
think?

r. MERRILL. The intention of the draft was this:
insofar as the local authorities have the power,
exercise it, over rates and service, the Federal com-
ion should leave it alone.

r. FERRIS. That is true, of course, only within the
e.

r. MERRILL. Whether the plants which were regu-
were entirely within the State or whether the lines
ed the State boundaries.

nistration Bill (H. R. 8716). The condition, in section 20 of
: "* * * whenever the States directly concerned have not
individually to take action or are unable to agree through
constituted authorities * * *." The language of the
hanged in the substitute bill recommended by the Committee,
ith that of the Section as later enacted (*H. R. Rep. No. 715,*
sess., pp. 27, 10; see also, *id.*, p. 19, containing this statement
al analysis of the substitute bill reported by the Committee:
er provides that where a State has no authorized authority

jurisdiction?

Mr. MERRILL. I doubt whether they would

Mr. FERRIS. Let us see about that.

Mr. MERRILL. Here is the State of Californ
is the State of Nevada [indicating on map].
lines from a company which has plants in t
California and which transmits and delivers
the State of Nevada, so that the lines cros
boundaries.

Mr. FERRIS. Do you not think the State
could control rates in an instance such as yo
if so, which commission would control, the
in the State of California or the commiss
State of Nevada?

[241]

Mr. MERRILL. They both control; the St
fornia fixes the rates for the service rendered i
of California, and the commission in Nevad
rates for the service rendered in Nevada. Th
doing it now.

Mr. FERRIS. Has any court passed upon t
to fix rates on business initiated between St

Mr. MERRILL. I cannot say whether they h
but the fact is that they are doing it. The
tion obtains in the upper part of the State, w
mission lines cross the California-Oregon bo

* * * *

Mr. FERRIS. I thought that under the bi
the local authorities' power ceased the power
mission would set in.

Mr. MERRILL. Yes. Assuming that this i
commerce in its clearest sense, the bill woul
fere so long as the Nevada commission was
everything in its State and the California
regulating everything in its State, unless th

* * That in cases of interstate transmission, so as the regulation is being exercised by the States erned and there is no question of a quarrel or dis- ement and the matter is not brought before the Fed- commission, that the Federal commission will ly keep hands off.

said (p. 68), was—

* on the theory that these are matters of local ern and should be handled by the locality when the ity will and can do it.

the hearing (p. 99), Representative Doremus asked l for his construction of the section "* * * re- jurisdiction that it vests in the commission to be this act over interstate rates." Mr. Merrill re-

y position on that is this—and that is what we in- ed to put into the bill—that in cases such as I men- ed yesterday, which are illustrated here [indicating nap] where a transmission line runs across a State and the same company serves customers in two or e States, that so long as the power of regulation of s and of service is and can be exercised by the local orities it had better be left with the local authorities. ny cases should arise where there is a disagreement veen the authorities of two or more States over ques- s of rate or service regulations, and it could not be ed between those authorities, then it is intended the matter may come before the commission for ement.

excerpt from the colloquy between Representative nd Mr. Merrill indicates clearly that section 20 was a time when the limits of state jurisdiction over sales energy in interstate commerce were still to be de- 01):

should be left with the local authorities, t
State commissions?

Mr. MERRILL. If they do it; and they a
now. Similar questions were raised 4 years
the other hearings were held, and I do not
competent to answer them. I know that t
commission, for instance, is fixing the rates
for power which is delivered from plants
[242] in California; I do not know whethe
tion has ever come before the courts as to wh
business is or is not interstate commerce,
meaning of the commerce clause of the C
so that exclusive jurisdiction would be ves
Federal Government, if it wished to exercis

Mr. DOREMUS. It might be a power whic
could exercise, or, if it failed to exercise it, c
in the jurisdiction of the State.

Mr. MERRILL. It is my judgment that so l
satisfactorily handled by the several States it
be left with them.

The *Attleboro* case, *supra,* however, changed the s
declaring that the States could not authorize com
regulate interstate wholesale rates. This created a g
lation except where interstate wholesale transactio
licensed project power. Where licensed project pow
interstate commerce, this Commission had authority
tion 20 because the States could not provide commi
power to regulate rates therefor.

In 1935, Congress, in Part II of the present Act,
gap by extending this Commission's authority to
sales [11] of electric energy in interstate commerce a
for resale.

In view of the foregoing analysis, the failure of C
amend section 20, when it enacted Part II, is unde
For, if Congress in 1935 believed that it had, in 192
the powers of the States so as to permit them to r

ed section 20 to avoid conflict with jurisdiction con-
is Commission under Part II. Instead, it left sec-
hanged and unrepealed because still necessary to
lation of retail rates for interstate licensed project
ates which had failed to provide commissions with
regulate such rates, or where failure of State com-
agree on regulation would otherwise render such
nworkable.

her our search has produced a reasonable interpre-
ection 20 which avoids repeal by implication, or
conflicting part of that section be deemed repealed
ion, the finding that the States are unable to agree
essary condition precedent to our authority under
, for the rates here in question, being interstate
ates held beyond the regulatory power of the States
boro case, *supra,* the condition of section 20 would
ble. Our jurisdiction, therefore, would not be de-
on our finding that the States are unable to agree.
gly, we conclude that the States have no power
on 20 to regulate interstate wholesale rates of "li-
ic utilities" in conflict with our power under Part
we have jurisdiction not only under sections 205
Part II, but also [243] under section 20 of Part I,
e basis of our finding that the States are unable
independently thereof.

Harbor a vested right to have its rates regulated as prescribed by section 20?—One other conten-
ed by Safe Harbor in regard to jurisdiction should
Safe Harbor contends that it cannot be regulated
rovisions other than those in section 20, because it
s license to be a contract, and argues that the effect
3, which saves outstanding licenses from alteration,
h its license, issued subject to the provisions of the
ter Power Act of 1920, is to protect the license from
y Congress without Safe Harbor's consent. It does
that the rate fixed by this Commission under sec-

agency, for that by another. The alteration oppo
one of procedure, and procedural changes may be eff
out consent of the "licensee." [12]

Conclusion.—For the reasons stated, we find and
diction to regulate Safe Harbor's interstate whol
under section 20 of Part I and sections 205 and 20
of the Act. Safe Harbor's motion to dismiss for wa
diction is, accordingly, to be dismissed, and we turn
sideration of the rate to be fixed.

* * * *

---

[12] *Pennsylvania Power & Light Co.* v. *Federal Power Commis*
445, cert. den. 321 U. S. 798; *Safe Harbor Water Power C*
Federal Power Commission, supra.

IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

ŒNIA ELECTRIC POWER COMPANY,
corporation,

Petitioner,

vs.

L POWER COMMISSION,

Respondent

OF MINERAL, State of Nevada,
TED STATES OF AMERICA,

Intervenors.

INTERVENOR MINERAL COUNTY'S ANSWERING BRIEF

---

tion for Review of an Order of Federal Power Commission.

L. E. BLAISDELL

IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

RNIA ELECTRIC POWER COMPANY,
corporation,

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vs.

L POWER COMMISSION,

Respondent

OF MINERAL, State of Nevada,
TED STATES OF AMERICA,

Intervenors.

INTERVENOR MINERAL COUNTY'S ANSWERING BRIEF

---

ral County, State of Nevada, intervenor, as and for ring brief in the above entitled cause, hereby adopts ering brief of the Federal Power Commission, and tes the same herein by reference.

Respectfully submitted,

United States Court of Appeals for the Ninth Circuit

IFORNIA ELECTRIC POWER CO., *Petitioner*

v.

ERAL POWER COMMISSION, *Respondent*

---

ition for Review of the Federal Power Commission

FOR THE UNITED STATES AS INTERVENOR

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stant Counsel,
Bureau of Yards and Docks,
Department of the Navy.

..... 1

ated 6

l 7

..... 10

to the Navy are regulable by the Federal Power Commis-
der Part I of the Federal Power Act, because they are sales
rstate commerce, Nevada has not provided a commission
wer to regulate these sales, and California and Nevada are
to agree on terms of regulation 14

e power sold to the Navy enters interstate commerce..... 15

vada has not provided a commission with power to regu-
ate the sales to the Navy; in any event, Nevada and Cali-
fornia have been unable to agree over regulation of these
ales 16

ral Power Commission has jurisdiction over petitioner's
the Navy under Part II of the Act, inasmuch as these
e sales for resale in interstate commerce 20

itioners' sales to the Navy are sales for resale in inter-
tate commerce 21

e sales to the Navy do not come within any of the excep-
ions of Section 201 23

hat the energy sold is generated at projects licensed under
does not operate to exempt the sale thereof from rate regu-
nder Part II 27

Commission's order is substantively valid 33

..... 34

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CITATIONS

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United States Court of Appeals for the Ninth Circuit

No. 12987

FORNIA ELECTRIC POWER CO., *Petitioner*

v.

ERAL POWER COMMISSION, *Respondent*

---

ion for Review of the Federal Power Commission

OR THE UNITED STATES AS INTERVENOR

STATEMENT

petition for review filed under Section the Federal Power Act (49 Stat. 838, 860, 825l(b)), petitioner seeks review of an order eral Power Commission applying certain re- s of the Act to petitioner's rates for electric ich it sells to the United States through the reau of Yards and Docks, Department of the use and resale at the Naval Ammunition awthorne, Nevada, as well as to Mineral

support of the Commission's order, will be c
those aspects of the order relating to petition
to the Naval Ammunition Depot.

Petitioner owns and operates an inter
system for the generation and distribution o
power in California and Nevada (R. 85, 174-1
power sold to the Navy (and to Mineral C
generated in and transmitted from petitio
called Northern Division plants in California
The electric energy sold to the Navy is del
Navy-owned transmission lines and metered
tioner's Mill Creek plant substation in Mon
California (R. 86, 104, 190-197). From ther
through the Navy-owned transmission lines a
California-Nevada state boundary to the Na
at Hawthorne.

The electric energy which is delivered to
(and to Mineral County) at Mill Creek is
from three sources. Most of it comes from pe
three plants in its so-called Mono Basin sy
Poole, Rush Creek, and Mill Creek plants. I
Rush Creek transmit power to petitioner's
Leevining substation, whence it flows over a 5
transmission line to the Mill Creek substatio
it is delivered to the Navy and Mineral County
107). The output of the Mill Creek plant is
livered at the Mill Creek substation. The th
Basin plants are all hydroelectric projects lic
the Federal Power Commission under Sectio
Part I of the Federal Power Act (41 Stat.

7% of the energy supplied to the Navy and to County originated in these three plants (R. 86,

se times of year when the output at Mono insufficient to meet the needs of the Navy and County, the remainder is supplied from two urces: (1) energy purchased by petitioners Owens River plants of the City of Los Angeles e interconnected with petitioner's main 110,000 hern Division transmission line, running from Creek to Leevining substation; (2) energy d at five hydroelectric plants owned by peti- Inyo County, California, known as the Bishop nts, four of which are operated under licenses the Power Commission. The flow is from reek over the 110,000 volt main transmission eevining substation, a distance of about 60 d from Leevining over the 55,000 volt line to ery point at Mill Creek. In 1949 about 10.7% rgy supplied to the Navy and Mineral County m the Owens River source and about 4.6% Bishop Creek plants (R. 86, 190-222, 333-349). st of the energy sold to the Navy flows over) volt line from Leevining to Mill Creek, and t flows through the sixty mile main transmis- from Bishop Creek to Leevining (R. 107,

itching facilities at Mill Creek are owned by (R. 86, 107, 190-197). The Navy and Mineral

County each owns a 55,000 volt transmission
Mill Creek to its own distribution points in
(R. 86, 107, 182). At Hawthorne, the energy
formed to lower voltages for distribution (R.
In addition to the electric energy purchased f
titioner, the Navy generates a small part o
needs on three diesel generators located at t
Depot. In 1949 the amount of power so gene
equivalent to 7.5% of the power purchased f
tioner (R. 89-90).

The power purchased or generated by the
used to supply the electric energy needs of
pants of a housing project, which was built f
occupied by civilian employees of the Depot
the energy needs of the operators of the Dep
ous concessions. In addition, it is used to op
Navy's various facilities at the Depot. Each h
business unit has a separate meter, and the
thereof is billed, and required to pay, for th
which he consumes (R. 90, 270-279, 539-554
1943 to 1949 between 15.4% and 28.6% of th
yearly total power supply was resold to these
and business concessions, the amount resold
the average 18.7% of the yearly total (R. 87,
561).

By a contract, dated July 1, 1943, which
terminable on sixty days' notice, petitioner
Navy agreed upon the rates to be charged
electric energy furnished by petitioner (R. 89

Commission of California, seeking a rate in-
respect of certain designated customers whom
was serving under special contracts (R. 90,
4). The California Commission conducted a
which resulted, in July, 1948, in a decision
rate increases under petitioner's various
(R. 167, 412-509). Among them was so-called
e P-2—Power—Wholesale General Service"
85), which schedule petitioner at this time
apply to the Navy. Invoking its sixty-day
on provision, petitioner attempted to ter-
s contract with the Navy. It continued to
wer, but sought to bill the Navy at the rates
in the new P-2 schedule (R. 90, 307, 558-560).
Navy denied that this new P-2 schedule was
e to the sales to it on the ground, among
at the California Commission lacked jurisdic-
the rates for these sales (R. 90, 7-8), peti-
August, 1949, applied to the California Com-
or a determination that the P-2 schedule was
e to these sales.
plication was pending for hearing when the
ommission instituted the present proceeding
. The Power Commission and the California
on agreed on a joint hearing, in accordance
s of the Power Commission (R. 7-8, 91). After
t hearing, at which staff counsel of both Com-
as well as the petitioner were represented, and
Mineral County and the Navy intervened as

directed petitioner to file the 1945 contract
schedule and to charge the rate there specifi
and unless * * * duly superseded'' by new ra
the Company might file in accordance with
mission's Rules and Regulations (R. 84-11
tioner, on June 21, 1951, after denial of its a
for rehearing (R. 113-144, 146-148), filed thi
for review (R. 623-646). The United States,
of the Navy, and Mineral County moved to
and this Court has granted these motions (R

QUESTIONS PRESENTED

Basically, the issue presented by this case i
the Federal Power Commission has juris
regulate the rates charged by petitioner for t
of electric energy to the Navy.

Specifically, the questions are:

1. Whether the Power Commission has ju
to regulate these sales under Section 20 of
the Federal Power Act (relating to licensee
ground that the energy is sold in interstate
and that the two states involved have been ''
agree'', within the meaning of Section 20,
regulation of the rates for these sales.

2. Whether these sales are sales for resale
state commerce, subject to the Power Com
rate regulation jurisdiction under Sections 2
of Part II of the Federal Power Act re
''public utilities.''

gulation under Part II, by virtue of the fact
ioner is a licensee subject to regulation by
under Section 20.

STATUTES INVOLVED

ovisions of Part I of the Federal Power Act
ely involved are as follows:

c. 20. That when said power or any part
of shall enter into interstate or foreign com-
e the rates charged and the service rendered
ny such licensee, * * * or by any person, cor-
ion, or association purchasing power from
licensee for sale and distribution or use in
c service shall be reasonable, nondiscrimina-
and just to the customer * * * and whenever
of the States directly concerned has not pro-
l a commission or other authority to enforce
equirements of this section within such State
or such States are unable to agree through
properly constituted authorities on the ser-
to be rendered or on the rates or charges of
nent therefor, * * * jurisdiction is hereby con-
d upon the commission * * * upon its own
ative to enforce the provisions of this section,
gulate and control so much of the services ren-
l, and of the rates and charges of payment
efor as constitute interstate or foreign com-
e * * *.

ovisions of Part II of the Power Act im-

for ultimate distribution to the public i
with a public interest, and that Federal r
of matters relating to generation to the e
vided in this Part and the Part next follo
of that part of such business which cons
transmission of electric energy in inter
merce and the sale of such energy at wh
interstate commerce is necessary in the
terest, such Federal regulation, however,
only to those matters which are not s
regulation by the States.

(b) The provisions of this Part shal
the transmission of electric energy in
commerce and to the sale of electric
wholesale in interstate commerce, but
apply to any other sale of electric ener
prive a State or State commission of
authority now exercised over the expo
hydroelectric energy which is transmitte
State line. The Commission shall have ju
over all facilities for such transmission
electric energy, but shall not have ju
except as specifically provided in this Pa
Part next following, over facilities use
generation of electric energy or over faci
in local distribution or only for the trans
electric energy in intrastate commerce
facilities for the transmission of electr
consumed wholly by the transmitter.

commerce if transmitted from a State and
umed at any point outside thereof; but only in-
as such transmission takes place within the
ed States.

) The term "sale of electric energy at whole-
" when used in this Part means a sale of
ric energy to any person for resale.

) The term "public utility" when used in this
or in the Part next following means any
on who owns or operates facilities subject to
urisdiction of the Commission under this Part.

) No provision in this Part shall apply to, or
eemed to include, the United States, a State
ny political subdivision of a State, or any
cy, authority, or instrumentality of any one
ore of the foregoing, or any corporation which
olly owned, directly or indirectly, by any one
ore of the foregoing, or any officer, agent, or
oyee of any of the foregoing acting as such in
ourse of his official duty, unless such provision
es specific reference thereto.

c. 205. (a) All rates and charges made, de-
ded, or received by any public utility for or in
ection with the transmission or sale of electric
gy subject to the jurisdiction of the Commis-
and all rules and regulations affecting or per-
ng to such rates or charges shall be just and
onable, * * *.

(c) * * * every public utility shall file
Commission, * * * schedules showing all r
charges for any transmission or sale subje
jurisdiction of the Commission, * * *.

(d) Unless the Commission otherwise o
change shall be made by any public utilit
such rate, charge, classification, or servi
any rule, regulation, or contract relating
except after thirty days' notice to the Cor
and to the public. * * *

SEC. 206. (a) Whenever the Commissi
a hearing had upon its own motion or up
plaint, shall find that any rate, charge, c
fication, demanded, observed, charged, or
by any public utility for any transmissio
subject to the jurisdiction of the Commi
that any rule, regulation, practice, or
affecting such rate, charge, or classificati
just, unreasonable, unduly discrimina
preferential, the Commission shall deter
just and reasonable rate, charge, class
rule, regulation, practice, or contract to
after observed and in force, and shall fix
by order.

ARGUMENT

It is our position that the Power Commis
jurisdiction in this case under both Part I and
of the Federal Power Act to regulate the rates
by petitioner for its sales to the Navy. Jur

is derived from the Federal Water Power Act
Act of June 10, 1920, c. 285, 41 Stat. 1063.
, which dealt with the granting of licenses to
nterprises for the construction and main-
f hydroelectric projects on public lands and
waters, imposed various requirements on the
s a condition of the grant. One of these re-
ts was that the sale of the power generated
projects be subject to rate regulation under
19 and 20. These Sections left the rate regu-
re prescribed to the states, but went on to pro-
in the event that the states concerned should
fford adequate regulation, regulation should
Power Commission. Section 20 deals with
nergy sold in interstate commerce, and is
the section here involved. The basic scheme
ection is to permit joint regulation by agree-
ong the states concerned if they are able to
reement. If, however, any of the states con-
ails to provide regulatory machinery or,
rovided such machinery, is unable to reach an
y operating agreement with the other states
d, jurisdiction is conferred on the Federal
ommission.

instant case, the Federal Power Commission
t the power which petitioner generates at
projects and which it sells to the Navy is sold
tate commerce. In addition, the Commission
at Nevada has failed to provide a commission

with the California commission. We belie
rulings to be correct and consequently that th
Commission properly concluded that it had
tion over these rates under Part I of the Ac
I, *infra,* develops our position in detail.

We also think that, aside from the question
diction under Part I, Sections 205 and 206 of
confer rate regulatory jurisdiction on the Pow
mission. Part II was enacted in 1935 as Ti
the Public Utilities Act of 1935. Act of A
1935, c. 687, Title II, 49 Stat. 837, 847. Par
ceeded under a scheme different from tha
Federal Water Power Act, which, as amended
enacted as Part I of the Federal Power Act.
was aimed at regulation of the transmission
at wholesale of electricity in interstate comme
out reference to the manner of its generatio
Part was not intended to oust the states of the
tion, which the Supreme Court had held th
exercise until forbidden by Congress, to reg
rates for retail sales of electricity, even though
state commerce. *Pennsylvania Gas Co.* v
Service Commission, 252 U.S. 23. But other
of the Supreme Court had made it clear that,
of the commerce clause of the Constitution an
less of congressional inaction, the states were
authority to regulate wholesale sales of e
interstate commerce (*Public Utilities Comm
Attleboro Co.,* 273 U.S. 83; *Missouri* v. *Kansas*

interstate sales in the Federal Power Com-

instant case, the Power Commission has held
ieve properly—that petitioner's sales to the
re wholesale sales (sales for resale) in inter-
merce and hence subject to the Power Com-
rate jurisdiction under Part II of the Act.
e terms of the Act on which jurisdiction is
not without ambiguity, judicial construction
t, as well as its legislative history, makes clear
ctness of this result, as we show at length in
infra.

ner not only denies that these sales are covered
II but, in addition, contends that, since these
of power generated at licensed projects, the
hich the states may, if they can, regulate under
ese sales are in no event subject to regulation
rt II by the Power Commission. We show in
, *infra,* that this contention is without merit
ecently been rejected by the Courts of Appeals
other circuits. *Safe Harbor Water Power*
PC, 179 F. 2d 179 (C.A. 3), certiorari denied,
957; *Pennsylvania Water & Power Co.* v.
. F. 2d .... (C.A.D.C. July 3, 1951), certio-
ted February 4, 1952.

I. The Sales to the Navy Are Regulable by the Federal Power Commission Under Part I of the Federal Power Act Because They Are Sales in Interstate Commerce, Neither State Has Been Provided a Commission With Power to Regulate Such Sales, and California and Nevada Are Unable to Agree on Terms of Regulation.

Section 20, Part I, of the Federal Power Act provides an integrated plan for state and federal regulation of rates for power generated on federally licensed projects, whenever this power enters interstate commerce. State and federal jurisdiction are concurrent under this section, but are mutually complementary. When state regulation is inoperative federal control takes effect.

The conditions under which state regulation is inoperative may be either legal or practical. The first condition arises when one of the states has failed to provide by law for a regulatory agency. The second condition arises when, although the states have provided regulatory agencies with appropriate authority, these agencies are unable to agree on rates or other terms of service.

We shall show that federal regulation is proper in the circumstances of this case, because (a) the power sold by petitioner to the Navy is in interstate commerce and (b) state regulation is inoperative, owing to (1) the failure of Nevada to provide a commission with jurisdiction over sales of this type, and (2) the inability of California and Nevada to agree.

itial applicability of Section 20 depends, by , on whether the licensed power enters inter- merce. We think it is clear beyond question power bought by the Navy does pass in inter- merce. The power is generated in petitioner's Northern Division plants, or, in part, pur- om the City of Los Angeles. Much of it flows ts of petitioner's main transmission line from Creek to Leevining. All of it flows over some the 55,000 volt line from Leevining to Mill here it is switched to the Navy lines and passes n into Nevada.

s a journey in interstate commerce. Indeed t of the journey alone which takes place on r's lines is in interstate commerce, for it is led that one who transports a commodity on ion of a journey over state lines is transport- interstate commerce, even though that portion burney takes place wholly within one state. *Daniel Ball,* 10 Wall. 557. Ownership of the sion lines at the state border is immaterial. k that the decisions in *Jersey Central Power Co.* v. *FPC,* 319 U.S. 61, and in *FPC* v. *East s Co.,* 338 U.S. 464, holding that electric and panies operating wholly within single states ng power transmitted across state lines are in e commerce, are controlling in this aspect of

that one of the purchasers is the Government free petitioner from regulations otherwise ap It is petitioner, not the Government, who regulated. Cf. *Penn Dairies* v. *Milk Contro* 318 U.S. 261. Furthermore Section 201(c) of defines energy as transmitted in interstate c if it is transmitted from a state to any poin the state. This definition, which is merely a formulation of the judicially established defi interstate commerce, obviously covers petition to the Navy.

B. Nevada Has Not Provided a Commission With Power the Sales to the Navy; In Any Event, Nevada and Cali Been Unable to Agree Over Regulation of These Sale

It is clear, therefore, that Section 20 is the a section of the Act.[2] Section 20 provides, in ap circumstances, for either federal or state re We think that federal regulation is appropria case. Under Section 20 federal regulation operative when either of two events occurs: (1 ever any of the states directly concerned has vided a commission or other authority to en requirements of such section within such state when "such states are unable to agree throu properly constituted authorities on the servi rendered or on the rates or charges of payme for."

---

[2] Petitioner contends that Section 19 is applicable, be tioner's project licenses incorporate the provisions of

ia has no duly constituted commission with any
ver wholesale rates, even within Nevada. More-
en if the Public Service Commission of Nevada
h power, it has evinced and acted upon its
iat it lacked this power. This belief, acted
mounts to an "inability to agree" within the
; of the statute.

e Public Service Commission of Nevada has no
y to regulate petitioner's sales to the Navy.
clear in the first place from a mere reading of
utes defining the jurisdiction of the Public
Commission, Nev. Comp. L. (1929) § 6100,
. 35. The Public Service Commission is
risdiction over "public utilities." Nev. Comp.
) § 6100, *infra,* p. 35. "Public utilities" are
to include plants within the state distributing
ty, Nev. Comp. L. (1929) § 6106, *infra,* p. 35.
petitioner is not within the state, it is not
he jurisdiction of the Nevada Commission.[3]
gnificantly, however, the Nevada statutes ex-
exempt sellers at wholesale from the jurisdic-
he Public Service Commission. Section 6147 of
piled Laws, *infra,* p. 36 authorizes public utili-
uy electricity from other suppliers, and Section
ra, p. 36 subjects the purchase contracts to
l of the state commission. But Section 6149
37 expressly provides that in no circumstances
e seller be deemed to be a public utility or be
to the jurisdiction of the Nevada Commission.

This, we submit, conclusively indicates that
has provided no commission with power to adm
the provisions of Section 20 of the Federal Pow
as they apply to petitioner's sales of power to th
Since the Navy resells part of the power it buy
petitioner, as we show at length, *infra,* pp. 21-2
tioner is in the position of a wholesaler exem
Nevada law, from the jurisdiction of the Nevad
mission.

2. As we have indicated, the failure of Ne
endow its Public Service Commission with au
to regulate wholesale dealings in power is itse
cient to bring petitioner within the ambit of
jurisdiction. But the second condition of Sec
making federal control appropriate, has also be
for the California and Nevada Commissions ha
unable to agree on rates. FPC so found, and i
ing, being supported by substantial evidence, n
be controverted in this Court. *Universal Camer*
v. *NLRB,* 340 U.S. 474; *FPC* v. *Hope Natural G*
320 U.S. 591.

The Nevada Commission never undertook reg
jointly with California. The Chairman of the
Commission was present at the hearing below,
fused to enter an appearance (R. 153-154)
Nevada Commission was given an opportunit
a party to the joint hearing, as the Nevada laws
(Nev. Comp. L. (Supp. 1941) § 6167.12), but it
this opportunity, stating that Nevada prefe
await the outcome of the hearing below (R. 154

to the Nevada Public Service Commission, in-
that the Nevada Commission had no power
es charged by municipal corporations (R. 186-
-514). The fair inference from this evidence,
ss of the correctness of the opinion expressed
that the Nevada Commission believed itself
ss to act in this case; and, because it believed
owerless, it never undertook joint regulation
lifornia.[4] For this reason, also, petitioner's
a subsequent opinion of the Attorney General,
ng that the Nevada Commission had jurisdic-
retail rates, is immaterial (R. 126-131). The
goes to the Nevada Commission's state of
nd this does not appear to have changed.
s posture there was a clear inability to agree
ne meaning of Section 20. As the Third Circuit
d in *Safe Harbor,* commencement of negotia-
not a prerequisite of a failure to agree; it is
that time passes without any effective joint
Safe Harbor Water Power Corp. v. *FPC,* 179
9, 191-192 (C.A. 3). Moreover, events subse-
the commencement of proceedings for fed-
ulation by the Power Commission may be
ed in determining that no agreement can be
179 F. 2d at 192. In this case, no steps have
ken toward agreement since 1949, when these
ngs were instituted. These considerations, we

vidence deals with the question of agreement over the
ounty rates and is silent over the Navy rates, but we think

sublimit, point conclusively to a default by th
concerned, so that the jurisdiction of FPC ha
while attached under Part I of the Act.[5]

**II. The Federal Power Commission Has Jurisdiction O
tioner's Sales to the Navy Under Part II of the A
much as These Sales Are Sales for Resale in I
Commerce.**

Part II of the Act provides an independent b
FPC jurisdiction to require the filing of peti
rates. Part II was enacted to create jurisdicti
sales at wholesale in interstate commerce. One
purposes of this enactment was to fill in the
public utility regulation created when the dec
Public Utilities Commission v. *Attleboro Co.,* 2
83, denied to the states the power to regulate in
wholesale transactions. See Sen. Rep. No. 62
Cong., 1st Sess., pp. 17, 48; H. Rep. No. 131
Cong., 1st Sess. p. 7; *Connecticut Light & Po*
v. *FPC.,* 324 U.S. 515, 525-527; *Jersey Central*
& Light Co. v. *FPC.,* 319 U.S. 61. On the othe
the Act reserved to the states their control ove
sales, even though the sales were in interstat
merce. *Connecticut Light & Power Co.* v. *FPC*

---

[5] It may be pointed out that, with respect to wholesale
only possible state regulation is regulation by agreemen
states concerned. The Constitution forbids unilateral
either state in the wholesale field. *Missouri* v. *Kansas Ga*
U.S. 298; *Public Util. Comm.* v. *Attleboro Co.,* 273 U.S. 8
the readiness of the California Commission to act is mean
this case. In the retail field an area remains in which e
is free to regulate that part of an interstate operation w

nhandle Eastern Pipeline Co. v. *Comm.*, 332
07.

this background in view, it is possible to re-
ne textual ambiguities in Part II, and it clearly
s that petitioner's sales in this case are regulable
C under Part II. This is precisely the kind of
on that is exempt from state regulation and
Part II was meant to reach. We shall show in
tion these sales fall within the terms of Part II.
following section, Point III, *infra* pp. 27-33, we
ow that the fact that these sales are of power
ed at projects licensed under Part I does not
em out of the operation of Part II.

oner's Sales to the Navy Are Sales for Resale in Interstate Commerce.

provisions of Part II granting the Power Com-
the authority to regulate rates and to compel
g of schedules are Sections 205 and 206. These
s apply to "any * * * sale [by a 'public utility']
to the jurisdiction of the Commission". Peti-
oncedes that it is a "public utility",[6] and under
s 201 (b) and (d) conjointly, the Commission's
tion embraces sales of electric energy for resale
rstate commerce.

clear that petitioner's various Mono Basin facilities are
for *transmission* in interstate commerce, the first of the
ve bases of jurisdiction set forth in Section 201(b). Sec-
c) defines such transmission as transmission from any point
e to any point outside that state. This alone would give
r Commission jurisdiction over these facilities and peti-

Since we have shown above, *supra*, pp. 15-16,
sales to the Navy are in interstate commerce
Central Power & Light Co. v. *FPC*, 319 U.S. 6
v. *East Ohio Gas Co.*, 338 U.S. 464) it remai
shown that these sales are sales at wholesale.
to that now.

Section 201(d) defines sales at wholesale as
any person for resale. On the average, some 1
each year's supply of energy was resold by th
to the business concessionaires and the occupan
public housing at the Hawthorne Naval Depo
tricity so sold to each such consumer is se
metered and each consumer is billed and is req
pay for the energy he consumed. To the extent
energy so delivered came from petitioner, peti
sales to the Navy were obviously for resale.

Petitioner contends that because the
between it and the Navy did not mention these
the transaction cannot be regarded as a sale fo
(Pet. Br. p. 67). But, it is clear that petitio
aware of these resales (See R. 560, 305-307)
enough that the sales be made with knowledg
uses to which the power was to be put; it is no
sary that the purposes of the sale be set ou
contract. The sales were "made with a view
* * * resale." See *Kalem Co.* v. *Harper Bros.*, 2
55, 62; cf. *Hartford Electric Light Co.* v. *FPC*
2d 953, 958-960 (C.A. 2) Certiorari denied, 3
741.[7] After all, the Power Commission's juri

dent upon the facts as they exist, and not upon
s used in contractual agreements which can be
to fit the whims or desires of either party.
oes it detract from the wholesale nature of pe-
s sales that not all of the energy purchased was
It is enough that any part of the power sold
resale. See *Connecticut Light and Power Co.*
324 U.S. 515, 520-521, 536.[8] Reference to the
ve purpose of "filling the gap" left by the *At-*
ase eliminates any problem arising from the
mixed uses of the energy. In *Attleboro* the
ed the interstate energy both "for its own use
sale". 273 U.S. at 84. Thus such mixed sales
hin the "gap" left by that case, and it follows
gress meant the statute to cover them.

es to the Navy Do Not Come Within Any of the Exceptions of Section 201.

itioner urges that its sales to the United States
sales at wholesale within the meaning of the
ause Section 201(d) defines sales at wholesale
o any *person* for resale, and the United States
person. This contention it seeks to support by

---

er Commission's finding that the sales were at wholesale.
easonable inference from the evidence; and, the Power
n having drawn this inference on the basis of substantial
he finding should not be set aside.

o not find that Congress has conditioned the jurisdiction
nmission upon any particular volume or proportion of
energy involved, and we do not think it would be appro-

reference to Section 3(4) and Section 201 (
latter of which says that the provisions of Part
not apply to the United States, a state, or a
subdivision of a state, or other governmental b

The argument is specious. The exemption
United States is from the regulatory burdens
Act, not from such rate benefits as may accr
from the regulation of petitioner's rates. In sh
exemption means only that the United States i
be deemed a public utility. The "provisions"
II, from which governmental bodies are excep
provisions for regulation of public utilities. Th
thrust of the Act is toward regulating the s
wholesale, and not the buyer. The United S
only the buyer of the wholesale power.

This view is supported by several conside
First, the contrary reading urged by petitione
consistent with other provisions of the Act.
ample, Section 306 allows "any person, State,
pality, or state commission" aggrieved by an
of a licensee or public utility to apply to FPC
dress. This indicates that the benefits to buye
regulation under Part II must accrue to gover
bodies as well as to private persons—the exact
tion which petitioner's argument attempts to

The verbal problem presented by this conte
petitioner's can give no real difficulty, so long
recognized that the entire thrust of Part II is
lating public utilities. What is a public utilit
fined in Section 201(e); Section 201(f) defines

ances where the United States sells electricity
e, its rates are not regulable by FPC under
But none of these provisions bears any rel-
purchases by the United States. The Act was
ot aimed at this aspect of the transaction.[9]

tioner also argues that its California facili-
l in the interstate transmission and sale to
, are also used for "local distribution" in Cali-
nd are therefore exempt under Section 201(b),
cepts facilities used in local distribution (Pet.
8). The fallacy in this argument lies in the
of "local distribution." We think it is clear
distribution in this provision means no more
s of energy at retail, and the transmission fa-
ere involved which, as we have shown *supra,*
are used for transmission of energy in inter-
merce, are obviously not used solely for local
tribution.

rticular facilities which petitioner asserts are
local distribution consist of the 55,000 volt
sion line from Leevining to Mill Creek (See R.

as consistently construed the word "person" in Section
including governmental bodies, despite the exemption
201(f), and the definition of "person" in Section 3(4)
i.e., "an individual or a corporation"). Thus, sales at
o municipalities have been held regulable. *Otter Tail*
2 F.P.C. 134; *Los Angeles* v. *Nevada-California Electric*
P.C. 104; *Otter Tail Power Co.,* Opinion No. 186 (Nov.
Michigan-Wisconsin Power Co., Opinion No. 213 (May
Interstate Light & Power Co. & Wisconsin Power &
Opinion No. 215 (July 12, 1951). This consistent ad-

116). This Leevining-Mill Creek line, which, I recalled, serves the Navy and Mineral County Mill Creek, is also used as a "general servic from which power is apparently tapped to s towns of Bridgeport, Leevining, Garbutt Mine summer resort of June Lake (R. 181; see I p. 62). While there is no evidence in the rec closing what local connections are involved in p the service to these communities, it is clear th connections must involve tap lines from the 55 line, and transformers which step down the to a level usable in distribution to private custo the power cannot be distributed directly into homes at the very high long-distance transmiss of 55,000 volts.

This fact is crucial, as was held in *FPC* v. *E Gas Co.*, 338 U.S. 464. The Supreme Court th

> But what Congress must have meant by ties" for "local distribution" was equipn distributing gas among consumers withi ticular local community, not the high-press lines transporting the gas to the local ma U.S. at 469-470)

The situation is analogous here. This is clear legislative purpose of providing federal contr the point where the Constitution permits stat tion to begin—the retail level. This is the "fi gap" purpose of the Act. It is clear that,

California could not, under the *Attleboro* regulate it, to the extent that it is used in con- ith transmission or sales for resale in inter- merce, and hence it falls within FPC juris- See also *Connecticut Light & Power Co.* v. U.S. 515, 534.

erence to the legislative purpose of "filling also reveals the error in petitioner's further n that it is exempted by the proviso that Part not deprive a state of "its lawful authority cised" over interstate transportation of en- titioner's argument is that California has law- rity under Part I of the Act, because peti- a licensee under Part I, and Section 20 gives authority over it. But, under the doctrine of , California has no "lawful authority" over lesale interstate sales. Its authority is limited retail. It may be that it has authority jointly ada by agreement; but, as we have shown, . 16-20, this authority is not "now exercised." rt, the purpose of the proviso against inter- ith state regulation was simply to reempha- im of restricting the application of Part II to holesale, leaving retail rate regulation where vays been, in the hands of the states. No ex- was intended for those having licensee status rt I.

act That the Energy Sold Is Generated at Projects ed Under Part I Does Not Operate to Exempt the

because the power so sold is generated at pr
censed under Part I.[10] The argument seems t
because the power is generated at projects
under Part I, the sales thereof are subject by
Section 20 to future state regulation—when t
can agree—and that this type of regulation
sistent with rate regulation by the Power Co
under Part II; further, that since the l
scheme of the Act is based on deference to t
the inconsistency must be resolved in favor
regulation under Part I.

1. This argument has been considered in gr
and has been rejected in even broader aspect
Courts of Appeals. *Safe Harbor Water Pow*
v. *FPC,* 179 F. 2d 179 (C.A. 3), certiorari de
U.S. 957; *Pennsylvania Water & Power Co.*
F. 2d (C.A.D.C. July 3, 1951),
granted February 4, 1952. The principles
nounced are fully applicable in this case.
fallacy in petitioner's position is its failure to
that a company may be both a licensee unde
and a public utility under Part II. We have
the preceding sections, that this is the situati

The qualifications for a licensee under Pa
production of electric energy in licensed pr
public lands or navigable streams, are qu
pendent of those for a public utility under Pa

[10] Even if petitioner were correct in this contention,
would not be improved, unless it were able to show f

sion or sale at wholesale of electric energy in
e commerce. A company and its activities,
rly, as here, sales at wholesale in interstate
e of electric energy generated at a licensed
may be subject to regulation under Part I or
or both. If it happens to be both as is the fact
s is coincidental.

ess recognized this possibility. It also recog-
at regulation of a company which was both a
ility and a licensee could take place under Part
ll as Part I. Thus, the House Committee, in
vith certain administrative provisions of Part
ned it unnecessary to use both terms—licensee
ic utility—in a provision that was to apply to
who happened also to be public utilities. The
as that, if they qualified as public utilities, they
ered, whether or not they were also licensees.
ep. No. 1318, 74th Cong., 1st Sess., p. 31. Also,
sman of Part II, Dozier DeVane, Solicitor of
explaining the relationship of Part II to the
er of the Public Utilities Act of 1935, pointed
"among the operating companies"—*i.e.,* pub-
es—were a number of licensees under Part I.
rings before Senate Committee on Interstate
ce on S. 1725, 74th Cong., 1st Sess., pp. 233-234.
lear, therefore, that a company and its activ-
y be subject simultaneously to the regulatory
nents of both Part I and Part II. We recog-
t, in a particular circumstance, this might

rate regulation by the states results in an orde
sistent with a Power Commission order in r
rates under Part II.

From this potential inconsistency petitio
cludes that there is an implied exemption of
from Part II. But the conclusion is not wa
When Part II was passed in 1935, Part I was
and reenacted. Act of August 26, 1935, c. 687,
863. Obviously the two Parts should be read
with an attempt to construe them consistently
possible. And in the circumstances of this ca
is no inconsistency. In this case, as we hav
supra, pp. 14-20, petitioner's rates for its sal
Navy are not subject to state regulation under
20. Under Section 20, by virtue of Nevada's f
provide a commission with power over wholes
and by virtue of Nevada's failure to agree w
fornia, the Power Commission has jurisdict
petitioner's rates to the Navy so that there c
inconsistent orders. Inconsistency cannot ar
the states are prepared to agree on regulatio
Section 20 and actually issue rate orders under
tion. Until that happens it is not necessary
mine whether the statute is internally inconsis

---

[11] As the Third Circuit pointed out in *Safe Harbor,* e
states should undertake to regulate petitioner's rates und
20, this by no means assures an inconsistency, because th
for fixing rates is substantially identical under Section 20
under Part II. Under Section 20 rates must be "
nondiscriminatory, and just," while under Section 206

m the foregoing it is clear that there is no in-
ıcy between Part I and Part II of the Act, as
n this case. But even if the Court should feel
possibility of future conflicting state and fed-
ers renders the statute internally inconsistent
ce, and that the potential inconsistency must
ed, the correct resolution is not by construing
to exempt licensees from federal control. The
pproach is rather to read Section 20 to exclude
ilities from state control. Once again refer-
ne legislative history supports this conclusion.
ctment of Section 20 without amendment in
er the *Attleboro* case, implies that Congress
ot to extend state regulation under Section 20
tate wholesale rates—that is, to rates charged
lic utilities." *Attleboro,* which was decided
ars after the original enactment of Section 20,
ch jurisdiction to the states, and if Congress
nt to reopen it, Congress would have done so
nacting the section. Thus far, in this brief, we
ımed for the sake of argument that the states
ulate wholesale rates under Section 20, where
ates involved were able to reach an agreement,
clearly no state could regulate unilaterally.
ch an interpretation is regarded as untenable,
f constitutional limitations as well as potential
in regulation, then—so far as wholesale sales
ate commerce are concerned—even joint regu-
the states must be deemed invalid. Section

the absence of congressional prohibition, to
retail sales in interstate commerce, but no mo

This view is consistent with the *Attleboro*
and the cases preceding it. It is consistent wit
of filling the gap left by *Attleboro* with fede
lation. Moreover, nothing in the language o
20 suggests that Congress granted to the stat
powers than *Attleboro* left to them, and mu
legislative history suggests that Congress wa
confirming to the states the powers which th
constitutionally exercise. Congress could not
tended, in 1920 when Section 20 was first en
extend state regulation beyond its recognize
whatever these limits might ultimately pro
Hence Congress' provision for state regulat
have referred only to regulation within the
sphere of state authority—which turned out t
ited to retail interstate sales. For *Attleboro*
other cases defining these boundaries had not
decided. The 1935 reenactment without cha
firmed the dimensions of this sphere.

On the other hand, in enacting the public ut
tions of the Act—Part II—Congress was cl
tending federal regulation. It was extending
regulation into all the interstices which the sta
not reach. Part II, moreover, is the later le
All this strongly suggests that in any irrec
conflict between Part I and Part II it is the
and not the latter, which must give way. Un
a reading, the overlapping of jurisdictions is

energy at wholesale in interstate commerce,
ugh the energy involved is generated at a
censed under Part I, are to be regulated ex-
by the Federal Power Commission. We re-
owever, that since there is no overlapping of
ons in the circumstances of this case, the prob-
consistency need not be resolved now.

Power Commission's Order Is Substantively Valid.

l more may be said in answer to petitioner's
n that the Power Commission cannot require
ement'' of petitioner's contract with the
cause the contract was terminated in accord-
its provisions (Pet. Br. pp. 68-71). A short
that the Commission's order does not require
ement'' of the contract. The order provides,
the last rates under which sales were made to
, which happen to be the rates under the con-
iled as a rate schedule; second, that petitioner
om charging—without the Commission's ap-
ny rates other than those filed with the Com-
nd, third, that, so long as sales continue, they
t the rates so published until petitioner comes
wer Commission in a proper proceeding for an
which petitioner is free to do. As these
never previously been published, the order
logically prior step of requiring their publica-
ese requirements as to filing and changing of
form with the clear provisions of Sections 205
s well as with provisions of Section 20, which

Interstate Commerce Act, 24 Stat. 380, as am
U.S.C. 6(1), 6(3).

CONCLUSION

For the foregoing reasons it is respectfully s
that the order of the Federal Power Commissi
be affirmed.

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FEBRUARY, 1952

rtinent provisions of the Compiled Laws of 929 Edition, provide as follows:

100. Commission Created. The public serv- ommission is hereby created whose duty it be to supervise and regulate the operation naintenance of public utilities, as hereinafter d and defined, in conformity with the pro- ns of this act.

106. "Public Utility" Defined.—Excep- —Embraces All Corporations Furnishing ic Service.—Further Application of Term blic Utility." * * * "Public Utility" shall embrace every corporation, company, indi- l, association of individuals, their lessees, ees or receivers appointed by any court what- r, that now or hereafter may own, operate or ol any ditch, flume, tunnel or tunnel and age system, charging rates, fares or tolls, di- or indirectly, any plant or equipment, or any of a plant or equipment within the state for roduction, delivery or furnishing for or to persons, firms, associations, or corporations te or municipal, heat, light, power in any or by any agency, water for business, manu- ring, agricultural or household use, or sewer- ervice whether within the limits of municipal- towns, or villages or elsewhere; and the pub- rvice commission is hereby invested with full

and to the exclusion of the jurisdiction, re
and control of such utilities by any muni
town or village, unless otherwise provided

* * *

§ 6147. Public Utility Corporation M
chase Water or Electricity. Every pers
pany, corporation, or association, whic
gaged in business in this state as a publi
shall have, and it is hereby given, the righ
chase water or electric current for its use
public utility from any other person or cor
having for sale a surplus of such water o
current.

§ 6148. Must Apply to Public Servi
mission. Any public utility desiring to
such water or electric current for resale or
poses other than its own use shall file an
tion with the public service commission of
setting forth the terms and conditions of
posed purchase of such electric current
the person or corporation from whom s
chase is proposed to be made, the duratio
contract to purchase, and such other inf
relative thereto and in the possession of t
cant as the public service commission s
scribe. If the public service commission
it desirable in the public interest, that s
chase be made, it shall approve such ap
and upon such approval such public uti

5149. SELLER NOT DEEMED A PUBLIC UTILITY. AITH OF STATE PLEDGED. The person or cor- tion selling such water or electric current to public utility under such contract approved ne public service commission shall not thereby me, or be deemed to be, a public utility within neaning of any statute of this state, nor shall y virtue of such contract be deemed to be in or subject to the jurisdiction of the public ice commission of Nevada in any respect what- er, nor shall it thereby be deemed to be in any e a public service corporation, or engaged in a ic service. The terms and provisions of this hall be taken and considered to be a part of such contract, and the faith of the State of ada is hereby pledged against any alteration, ndment or repeal of this act during the ex- ce of any such contract, or any extension eof, approved by the public service commis- of Nevada.

IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

NIA ELECTRIC POWER COMPANY, a corporation,
Petitioner,

vs.

POWER COMMISSION,
Respondent.

PETITIONER'S REPLY BRIEF.

tion for Review of an Order of Federal Power Commission.

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Attorneys for Petitioner.

HAMMACK,
H M. LEMON,

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can be decided and should be decided under Part I
ct, which clearly denies FPC jurisdiction 2

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IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

NIA ELECTRIC POWER COMPANY, a corporation,
Petitioner,

vs.

POWER COMMISSION,
Respondent.

PETITIONER'S REPLY BRIEF.

Respondent (FPC) and Intervenors (Navy and County), in their briefs, follow substantially the e of argument, we will reply to all of them Some of our arguments they fail to answer, cite no decision which sustains their conten- hey complain that we rely upon the literal lan- the statute and, to avoid its effect, they call it of draftsmanship."

ndency of FPC to ignore Part I of the Act is in their brief, for, though Petitioner's brief the natural order in discussing Part I of the

I.

This Case Can Be Decided and Should Be Under Part I of the Act, Which Clearly FPC Jurisdiction.

Both by contractual provisions of Petitioner's (Pet. Op. Br., App. p. 6) and by the statutory p of Sections 19 and 20 of the Act, the regul Petitioner's rates involved herein is delegated State Commission or Commissions. If no interst merce is involved, the jurisdiction of Californ mission is complete under Section 19. If interst merce is involved, the jurisdiction lies in the t Commissions under Section 20. In either event, FPC does not have jurisdiction, and will not ha it be found at some future time that the State sions are unable to agree. There is no occasion recourse to Part II of the Act.

> *Safe Harbor W. P. Corp. v. FPC,* 120 F (C. A. 3) decided in 1941 (First Safe

Following that decision, the distinction betv rights and obligations of licensees under Part other interstate utilities under Part II of the recognized in two other circuits.

> *Alabama Power Co. v. FPC,* 128 F. 2d cit. syl. 18, 19, p. 293) (D. C. Cir.), 317 U. S. 652, 63 Sup. Ct. 48;

ontentions of our opponents to escape the plain
is of the Act and the effect of those decisions
llows:

is contended (FPC Br. p. 12) that *Safe Harbor*
Corp. v. FPC, 179 F. 2d 179 (C. A. 3) decided
(Second Safe Harbor) and *Pennsylvania W. & P.*
FPC, ... F. 2d, ... (D. C. Cir.) decided
1951 (certiorari granted), have in some way
d the application of Sections 19 and 20 of the
also weakened the decision in *First Safe Harbor.*

rst Safe Harbor, it was held that FPC did not
isdiction over rates for energy sold at wholesale
tate commerce by a licensee, there being no show-
States' disagreement. The energy was generated
sylvania and transmitted and sold for resale in
d. The crucial fact not stressed by our oppo-
that, after *First Safe Harbor* was decided in
very important change in conditions occurred.
s a letter, dated August 30, 1944, sent by Public
Commission of Maryland to FPC requesting it
jurisdiction in that same matter of rates charged
Harbor W. P. Corp. for energy generated in
vania and sold for resale in Maryland. That
as set forth in full and relied upon as showing
States were unable to agree in *Second Safe*
decided in 1949, and that decision was followed
sylvania W. & P. Co., decided in 1951. There-
cording to the express language of Section 20
Act, FPC had jurisdiction.

finding or evidence that the California and Neva
missions are unable to agree. In the Navy's
is twice incorrectly stated (pp. 18, 19) that the C
and Nevada Commissions have been unable to a
in both of our opponents' briefs, it is intimated t
duty rests on Petitioner to show that the Sta
missions have agreed or are able to agree. Th
endeavor to turn Section 20 around. That Sec
not require any such showing. It does require, a
out in our Opening Brief (pp. 46-48), a show
they are unable to agree, in order to support FI
diction. There is no such finding or evidence.

The matter is so simple that much ingenuity
sary to make it appear complicated. The Co
of the delivering state (California) regulates
charged for sales of energy for use in the receiv
(Nevada). If there is no protest from the latt
is no failure to agree. Nevada Commission h
had reason to protest, for the California Co
fixes exactly the same rates for sales to Minera
purchasers at Petitioner's Mill Creek Plant in C
as it does for other consumers of like quantities c
sold to other customers in California. It is a r
national note that California Commission is on
most rigorous Commissions in the country in th
of keeping utility rates at a minimum.

2. It is contended (FPC Br. pp. 37-40, 44-
Nevada does not have a Commission answering

d irrelevant evidence to dispute the plain language
on 16 of the Mineral County Power System
Act (Pet. Op. Br., App. p. 10). The first piece
evidence was Exhibit 6, being an opinion of the
General of Nevada to the effect that the Nevada
ion did not have jurisdiction over the rates of
County Power Dictrict No. 1, which was an
different kind of entity organized under a different

ext piece of evidence was a letter from the Sec-
the Nevada Commission, stating that the Nevada
ion did not have jurisdiction over Mineral County
ystem, because the latter was a quasimunicipal
on, which was not the fact. This was lay opinion
e the clear provisions of the Nevada law, and was
by the Hearing Examiner [R. 244-247]. But,
hearing [R. 110], FPC reversed the Examiner
porated this letter in the record.

the hearing herein, Nevada Commission requested
on of the Attorney General of Nevada as to its
on over rates of Mineral County Power System,
Attorney General rendered the opinion [R. 129]
id have jurisdiction just as provided in Section
e Mineral County Act, and further explained the
bility of his earlier opinion, Exhibit 6.

PC refused to receive this when tendered with our

To this plain error, FPC interposes two respon

First, it says that technical rules of evidence
be applied and no informality in taking testim
invalidate an order. Bearing in mind that this
crucial point on which the whole case turned s
Part I of the Act went, it is rather amazing t
that to ignore the Nevada Statute, to reject th
of the Attorney General, and to receive instead a
relating to a different matter and lay opinion
up by hearsay testimony of a stranger is merely
infraction of the rules of evidence or an inform

Secondly, while not claiming that the presen
the Attorney General's opinion of April 24, 1
too late, FPC merely says that it was late. As
of fact, a copy of that opinion was presented to
an appendix to our Reply Brief filed with FPC
1950, only three months after the hearing and tw
after the opinion was written and one month
had knowledge of it. On September 5, 1950, the
Examiner filed his initial decision [R. 13] s
the Petitioner on every point and recommen
missal of the case. The Attorney General's op
been given consideration and Petitioner had won
there was no occasion for Petitioner to do anyt
ther. FPC then held the case under advisement
months from September 5, 1950, to April 13, 19

, the Application for Rehearing filed May 4,
. 113] was accompanied by Motion to Reopen
rd and receive the neglected Attorney General's
[R. 126]. FPC could have admitted the Attor-
ral's Opinion as easily as it admitted other and
ative evidence which had been excluded by the
r.

FPC, confronted with the clear fact and law that
Commission does have jurisdiction to regulate the
Mineral County, makes what we have properly
e "bizarre" contention that the Nevada Com-
s not, as provided in Section 20, "a commission
authority to enforce the requirements of this sec-
in such state," unless it has power to enforce
rements of said section *without* such state. It
that Congress could have had in mind only the
e of state regulatory body empowered to regulate
hin its own state. There was no concept what-
a State Commission which would have authority
te rates outside its own state.

cites the statutes of Maryland and Pennsylvania
ve the respective Commissions authority to make
estigations, hold joint hearings, and issue joint
rrent orders with any other like Commission.
e statutes were enacted in 1927 and 1937, re-
, long after 1920 when the language of Section

any provision in State law authorizing the C
Commission to participate in a concurrent hear
the federal commission, the Order to Show Caus
[R. 7-8] set such a hearing and the same was d
FPC Rules (Sec. 1.37) made pursuant to Sec
of the Act provide, not only for concurrent hear
for joint hearings with State Commissions, irr
of any state statute expressly authorizing the sar
annual reports of FPC for many years back sh
such hearings and other forms of cooperation
frequent occurrence under the Act, without an
sponding state legislation. Obviously State Com
have as much power to cooperate with each
they do with FPC.

FPC makes the obviously unsound contention
(and attributes it to us) that, if Mineral Cou
overcharged for energy, all the Nevada Commissi
do would be to refuse to allow Mineral County
rates high enough to pay the excessive charge.
counsel will just read Section 20, they will find
the Nevada Commission need do would be to
its inability to agree upon the higher rate and th
matically invoke jurisdiction of FPC.

Equally extreme is the misconstruction placed
(Br. p. 17) upon Sections 6147, 6148 and 6149
Compiled Laws, as in some way incapacitating the

sons, not to engage in public service have surplus
power available for sale to a public utility.
as fear that, by such sales, the private owners
come public utilities. This statute was designed
rage such sales by assuring the seller that he
ot be caught in the regulatory machinery. It
ly to sellers who are not public utilities and pro-
t they shall not, by such sales, become public
This interpretation of the Act is demonstrated
nal sentence—a very unusual provision—which
he faith of the State of Nevada against any
, amendment or repeal of the act during the
of any such contract. To apply that act to a
o is already a public utility would reduce the
an absurdity.

uite evident that FPC does not like Sections 19
t prefers Part II of the Act and makes only a
ecognition toward Section 20, always linking it
ly with Sections 205 and 206.

ions 19 and 20 mean anything at all, they mean
State Commission or Commissions have exclu-
sdiction so long as such Commissions exist and
sagree. The device of ignoring this State juris-
y speaking broadly of FPC jurisdiction under
20, 205 and 206, jointly, is misleading. Ob-
both State Commissions and FPC cannot at the

II.

Petitioner's Rates Involved Herein Are Not to Regulations by FPC Under Part II, 205 and 206.

Whether or not the energy delivered by Peti the Navy and Mineral County is generically o tutionally in interstate commerce is not an issu Some interstate energy is expressly excluded by from FPC jurisdiction and left for regulatior States. That is constitutionally permissible unc cited in our Opening Brief (pp. 34, 39, 40) questioned by Respondent or Intervenors.

Admittedly, regulation of one very large class state sales is delegated to State authority, *v* directly to the ultimate consumer, and not fc Hence, the effort of FPC and Navy in this case that Navy resells some of the energy to employe on the Ammunition Depot Reservation. Such colorable and is really a part of the operatio Depot. The occupants live under military disci are subject to summary ejectment by the Con Officer [Ex. 23].

This exemption of sales in interstate commer dividual customers for consumption is worth re It shows that Congress did not think it nece desirable to provide for federal regulation in su It provided for federal regulation only where el ergy (or gas) was sold for resale to the gener It was trying to protect the general consumir typically a city or community. The record he

ates there are arbitrarily fixed without reference
of power purchased from Petitioner. All that
s to do is to fix house rent, electricity, water,
, garbage disposal and other services at a price
ggregate which will attract employees for work
ner hazardous place. It is immaterial how the
's expense is distributed among the accommoda-
ervices furnished. The whole is merely a matter
al accounting of the Navy. Of course, this is
y that Navy should not have a fair rate; it is
ay that this is not an example of resale regulation
ould carry out any policy of Congress since
gulation of the rate at Mill Creek would have no
ble relation to the rate charged the ultimate con-

er class of business which could constitutionally
ted as interstate commerce, but which is excluded
jurisdiction of FPC is transmission of energy
e State to another by the government, a State,
l corporation, or other political subdivision, agency
mentality. Section 201(f) states that "No pro-
this Part (II) shall apply to" any of the above
FPC's argument that this applies to those
but not to their activities is too captious to recom-
elf. Hence, the definition of interstate commerce
ic energy in Section 201(c) does not apply to
governmental agencies or activities. Navy and
County simply buy energy at the Petitioner's Mill
lant in California. What is done with it by
blic agencies is outside the statute and cannot be

vantageous rate than the rates fixed by the C
Commission. What assurance they have of tha
not know, but it certainly cannot always be tru
hardly possible that their interest is purely acade
if it were supposed that FPC would fix higher r
viously, the interest of the intervenors would wa
did not produce a complete reversal of position.

As we have said, FPC jurisdiction attaches un
II only to rates for energy sold at wholesale
state commerce and wholesale is defined in Sectio
as "a sale of electric energy to any person for
The definitions in Section 3, which apply throug
Act, define a "person" so as not to include Navy or
County. Our opponents admit that this is th
provision of the Act, and their only escape is to
"quirk of draftsmanship." Some provisions they
be interpreted very literally; others adverse to th
want ignored or cast aside as clerical misprisions

The contention of FPC is directly contrary to
tion they took respecting the word "person" i
States ex rel. Chapman v. Fed. Power Com., 1
796 (C. A. 4). Their brief in that case is c
pages 59-61 of our Opening Brief. This is
denied.

FPC argues (p. 23) that our contention wou
give effect to Section 306 of the Act allowing

ord "person" was deemed not to include govern-
encies. Section 306 provides:

ny person, state, municipality, or State Com-
on complaining of anything done or omitted to
ne by any licensee or public utility" etc. etc.

monstrates the understanding of Congress that
e word "person" alone would not have included
unicipality, or State Commission," and it was
to mention them expressly.

y decision cited holding that Section 3(3)(4)(7)
on 201(d) do not mean what they say is the
of FPC in *Otter Tail Power Company*. That
the present argument go on the assumption that,
municipalities for resale are not brought under
sdiction, they must go unregulated. That is not
eans merely that they are left to the State Com-
In the present case, they have been so regu-
two moderate and reasonable increases to meet
ased costs of service (measured in present day
ave been granted in the past three or four years.
the last order was sought by Navy and Mineral
the Supreme Court of California and denied.
31, Feb. 18, 1952.) Under California law, such
deemed a decision on the merits and tantamount
tion of the Commission's decision.

ons made by FPC about "filling the gap" left
oro are misleading. There was no gap created
licensees were concerned. As to other interstate
the gap was filled by conferring part of the

So, on two counts, sales to Navy and Miner
are exempt under Part II, first, because they a
interstate commerce as defined in the Act, and,
because they are not sales to a "person" as
the Act.

Some Jurisdiction Under Part II.

It is hardly fair to say, as FPC does (p.
Petitioner's position is taken as a "tactical m
cause it admits some FPC jurisdiction under
The inference seems to be indulged, contrary to
lished principles, that, if Petitioner is subject to
vision of Part II, it is subject to all and, hence
are all subject to FPC regulation. This is ve
not so and the argument now presented by F
designed to confuse.

The mere fact that a Company is a public
gaged in interstate transmission in electric en
not subject all of its rates to FPC regulation.
FPC would succeed to all of the functions of
Commissions so far as interstate utilities are
Each particular rate has to be examined to
provided in Sections 205 and 206, the transm
sale is subject to FPC jurisdiction and, for tha
we look to Section 201.

That is exactly what FPC held in *In the*
Wisconsin-Michigan Power Co., Docket E-6268
1951, quoted at page 36 of our Opening Brief

Accordingly, it is not only logical but necess
utility engaged in interstate transmission to ac

ses cited (Resp. Br. p. 12) being *Second Safe nd Pennsylvania W. & P. Co.* do not indicate ary. Respondent's discussion, itself, discloses of those cases was decided on the principle that s were unable to agree, thus bringing in FPC on under Section 20. Therefore, the rest of ssion as to jurisdiction under Part II is unneces-

DISTINGUISHABLE" 25%.

aims that, of the energy delivered by Petitioner approximately 25% is "resold" to employees government quarters in the Naval Reservation herefore, subject to FPC jurisdiction. It must ed that the remaining 75%, at least, is not sub-PC jurisdiction. Next, FPC says that the two led and therefore FPC has jurisdiction over the In our Opening Brief, we asked in effect why e "tail wag the dog."

answer (p. 27) is based on five cited cases.

Central P. & L. Co., Connecticut L. & P. Co. ford E. L. Co. are not in point, for they did not ates for mingled energy or rates at all. The tion there presented was whether or not those s came under the accounting provisions of Part e Act. It was held that they did, because they aged in interstate transmission of energy, not-ing that the amount of energy transmitted was ll. Obviously, if these Companies were required e FPC system of accounts, they would have to

to keep one set for intrastate operations and an
interstate operations. That is quite a different
from the mere delivery of so many kilowatt
energy at a schedule rate which can be very easil
or apportioned.

Kentucky Natural Gas is not in point, for th
states that the entire operations of that Compa
in interstate commerce.

That leaves only *Pennsylvania W. & P. C*
ported). Certiorari has been granted in that
ruary 4, 1952, so that it cannot be deemed a final
If it were, however, it does not present facts
to the instant case. There the local and inters
plies of energy were fed into a common system
from which local and interstate customers wer
In such a situation, power flows here or there
a demand is placed on the lines, much the same
flows out of a reservoir wherever resistance is
The respective flows of intrastate energy (hy
interstate energy (steam) fluctuated continually
hour, day to day, and even year to year. Eac
state and interstate, supported the other. T
simply a big "pool" of electric force fed cons
both sources in constantly varying quantities.

That is entirely different from the present ca
each month a definitely measured number of

Navy) show these quantities accurately separated
th. We have used 25% and 75% merely for
argument. The respective amounts can be
to decimals [see Finding 6, R. 105]. No repe-
mmission action would be required. The federal
commission would simply fix the respective
rest being mere mechanical and clerical com-

is no "inextricable" mixture in such operations.
Power Co. v. Fed. Power Com., 189 F. 2d 665
Cir.), we have an instance where FPC imposed
dition in a license for a transmission line that
ee connect said line with the government's line
smit government power, along with licensee's
While that condition was stricken out by the
e question is suggested: If the arrangement had
roved, would the next step have been for the
nt to claim that, since the licensee's power and
rnment's power were inextricably intermixed on
mission line, therefore, it all belonged to the
nt? Certainly not, for the mixture and separa-
ower in that way is a common every day job for
engineers. The case cited by Respondent (*City*
ngeles v. The Nevada-California Electric Corp.,
C. 104, 32 P. U. R. N. S. 193) was an ex-
that operation. There is no logical, reasonable
lausible support for that part of the Order herein

ACQUIESCENCE OR ESTOPPEL.

FPC argues (pp. 3-4) that Petitioner acqu
FPC regulation under Part II by filing som
Mineral County contracts as schedules. If th
jurisdiction as to Mineral County service, P
failure to file the Navy contract equally dispr
jurisdiction. As a matter of law, neither fact
anything, for jurisdiction cannot be conferred
acquiescence, estoppel, waiver or agreement.
solely from the statute.

FPC cites *City of Los Angeles v. The Ne*
fornia Electric Corp (supra). That case does
port any claim of acquiescence, for it involved
energy at all and, hence, in no event could co
Sections 19 or 20, which apply only to sales.
in that case were that this Petitioner, under an a
transmitted or carried power for the City of Lo
over this Petitioner's liner from Hoover or Bou
in Nevada to the City of Los Angeles for a cha
power was part of that allocated to the City by th
ment at the Dam, was purchased by the City fro
ernment and merely transmitted by the Compa
City. This transmission was interstate, and
subject to FPC jurisdiction under Part II of the
being no provision in Part I applicable there
case is of no significance here.

n to issue a license under Part I of the Act
ctric line which was not a "primary line," that
transmission line leading from a licensed project
ginning with the organization of FPC in 1920
some 20 years until March 20, 1941, FPC
issued such licenses for minor lines of all kinds,
of them, and many of such licenses are still
g. FPC jurisdiction to do so was formally
by FPC and by the Secretaries of the Interior,
e, and War, who had previously issued per-
rights of way under the Right of Way Acts
ur Opening Brief. Indeed, the three Secretaries
denied their own jurisdiction and refused to
further permits, the applicants being referred
or licenses under Part I of the Act.

arch 20, 1941, FPC suddenly issued Release
ying its jurisdiction to issue such licenses and
since refused to do so, referring applicants to
aries, who have resumed their activities, so long
d, under the old Right of Way Acts. Pacific
Co. sought such a license from FPC and, on
petitioned for review in the Court of Appeals
istrict of Columbia.

ourt affirmed FPC's decision and held, contrary
stration construction, interdepartmental agree-
20 years of general understanding, that FPC
ave jurisdiction to issue such licenses for "non

Conclusion.

There is no regulatory gap to be filled in
Nothing has escaped or will escape proper and
regulation exactly as contemplated by Congre
case seems to have been begun by FPC throug
understanding of Nevada law and the Interv
apparently merely assuming that federal regul
afford them lower rates.

The Order should be reversed.

Respectfully submitted,

HENRY W. COIL,
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H. M. HAMMACK,
KENNETH M. LEMON,
Of Counsel.

No. 12,987

IN THE

nited States Court of Appeals

For the Ninth Circuit

RNIA ELECTRIC POWER COMPANY,
rporation,
Petitioner,

vs.

AL POWER COMMISSION,
Respondent.

EF OF CALIFORNIA PUBLIC UTILITIES COMMISSION AS AMICUS CURIAE.

on for Review of an Order of Federal Power Commission.

EVERETT C. MCKEAGE,
BORIS H. LAKUSTA,
WILSON E. CLINE,

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Argument 8

..... 13

. Even assuming interstate wholesale sales by a ee the Federal Power Act, properly construed pre- s Federal Power Commission jurisdiction provided tates directly concerned have regulatory commis- and there is no showing that such states are unable ree on the rates to be charged..... 13

I. Sales to the Navy. There is no Federal Power nission jurisdiction whether Part I, Section 20, ap- covering both the licensed and non-licensed por- of the energy sold, or Part II, Section 201(b), es, covering both the licensed and non-licensed por- or Part I applies to the licensed portion and Part plies to the non-licensed portion of the energy sold 24

II. Sales to Mineral County. There is no Federal r Commission jurisdiction whether Part I, Section pplies, covering both the licensed and non-licensed ons of the energy sold, or Part II, Section 201(b), es, covering both the licensed and non-licensed por- , or Part I applies to the licensed portion and Part plies to the non-licensed portion of the energy sold 34

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No. 12,987

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For the Ninth Circuit

NIA ELECTRIC POWER COMPANY,
poration,
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s.
L POWER COMMISSION,
Respondent.

F OF CALIFORNIA PUBLIC UTILITIES COMMISSION AS AMICUS CURIAE.

for Review of an Order of Federal Power Commission.

INTRODUCTION.

alifornia Public Utilities Commission respectfully its presentation herein, being mindful that an *curiae* brief may properly presume upon the attention only if it serves to illuminate the course nent or advances additional material for consider- he California Commission agrees with California Power Company that the order of the Federal

ever, the California Commission's approach is n
respects the same. The plan, therefore, will be t
the pertinent arguments and to develop those v
quire further analysis, to the end that the fallaci
underlie the Federal Power Commission's claim
diction may be readily detected.

The California Commission has more than pa
terest in the question. On July 3, 1951, it issued
No. 45913, reported in 50 Cal. P.U.C. 749, att
Appendix A hereto. The question of state versu
jurisdiction was thoroughly explored because it w
sary to determine whether certain rate increase
ized generally by the California Commission to C
Electric Power Company were to be applied to
the Navy and Mineral County. The California
sion had the benefit of the same testimony and
briefs which were before the Federal Power Co
in the proceeding which led to the decision he
attack. The California Commission concluded th
have jurisdiction. Attention is respectfully invit
corresponding conclusion of the federal Exami
September 5, 1950, that the Federal Power Co
did not have jurisdiction. His proposed decision
in the Record herein beginning at page 13, merits
ful study as it is a well-prepared, well-reaso
logical opinion. Seven months after it was filed,
eral Power Commission, Commissioner Nelson L
dissenting, issued the precisely contrary opinion

g him, without explanation, in his rulings upon issibility of evidence.

alifornia Commission decision was made the subetitions for writs of review filed before the Cali-Supreme Court by the United States (Navy Det) and by Mineral County. Writs of review were n January 21, 1952, and petitions for rehearing of ial were denied on February 18, 1952. Under Cali-rocedure, the California Supreme Court's action to a determination upon the merits.

outhern California Edison Co. v. Railroad Commission, 6 Cal. 2d 737, 747 (1936);

apa Valley Electric Co. v. Railroad Commission, 251 U.S. 366, 371-373 (1920);

nta Monica v. Railroad Commission, 179 Cal. 467 (1918).

llowing outline of dates presents graphically the of events alluded to:

edings Commencing n Calif. P.U.C.	**Proceedings Commencing in F.P.C.**
2, 1949, Calif. Elec. Co. filed application to alif. P.U.C. determine r certain rate increases to sales to Navy and l County.	
hearing *Oct. 7, 1949.*	
	February 15, 1950, F.P.C. issued order to show cause against Calif. Elec. Power Co.

Proceedings Commencing in Calif. P.U.C. (Continued):	Proceedings Comm in F.P.C. (Continued
March 20, 1950 Concurrent hearing before Calif. and Fed. Commissions on jurisdictional question. Briefs subsequently filed by the appearances.	
	September 5, 1950, Decision filed by for F.P.C., denyi jurisdiction.
	April 13, 1951, F.P.C 212, reversing Exa asserting jurisdicti
	June 5, 1951, F.P. rehearing.
	June 21, 1951, Ca Power Co. filed P Review in this Cou peals for the Nint
July 3, 1951, Calif. P.U.C. Decision 45913, finding jurisdiction in the California Commission.	
January 21, 1952, California Supreme Court sustained Decision 45913 by denying writs of review, S. F. No. 18463 and S. F. No. 18464.	
February 18, 1952, California Supreme Court denied rehearing, S. F. No. 18463 and S. F. No. 18464.	

bject to Federal Commission regulation in some
is caught between conflicting orders respecting
ales. Under the Federal Power Act there cannot
taneous jurisdiction by state and federal author-
such sales. It is respectfully submitted that the
of the California Commission in its Decision
s approved by the California Supreme Court, is
nd if so, it follows that the Federal Power Com-
has no jurisdiction over these sales.

proceeding with the argument one or two pre-
observations will be appropriate.

e reads the opinion of the Federal Power Com-
and its brief before this Court, one is impressed
bsence in general of differentiation between the
ts pertaining to the sales to the Navy and those
ng to the sales to Mineral County. Such approach
confusion in a complex field. While a number of
inent arguments apply equally to both types of
ere are certain arguments which apply specifically
to one or the other. For that reason, care will
in the analysis here to keep the questions prop-
arated.

hearing upon the order to show cause, the staff
Federal Power Commission introduced evidence
that, while most of the electric energy sold to
y and to Mineral County is derived from licensed
there are times when all or a portion of it

portion of the electric energy sold, the best-rea
terpretation of the Federal Power Act makes S
of Part I the applicable section in determining
tion over the sales to the Navy and Mineral Co
will be shown that by the application of that s
jurisdiction is lodged in the Federal Power Co
upon the facts. However, the applicability of S
need not be finally determined because, as will b
no Federal Power Commission jurisdiction lies,
the Act be construed to make Part I, Section 2
cable or Part II, Section 201(b).

Similarly, it will be shown to be unnecessary
mine whether the sales are in intrastate or i
commerce. The Federal Power Commission wou
that its jurisdiction does not lie if the sales are
state commerce. The argument here will assume
sales both to the Navy and Mineral County are
state commerce. It will be demonstrated that,
standing, no Federal Power Commission jurisdi

An outline of the pertinent arguments establ
absence of Federal Power Commission jurisd
presented in the belief that it may prove of mat
It is divided into three main headings. Point I
arguendo wholesale sales in interstate comme
licensee. We deny that the sales to the Navy a
sale though we concede that the sales to Minera
are of that character. However, since the ord
Federal Power Commission lumps the sales tog

Point I is presented to show that, even upon *that* the Federal Power Act, properly construed, art I applicable and excludes Federal Commission ion provided the states directly concerned have ry commissions and have not been shown unable on the rates to be charged. This, we maintain, terpretation of the Act which respects the intent ress.

II deals solely with sales to the Navy. It shows, t Part I, Section 20, precludes Federal Power ion jurisdiction because the conditions to its are not met. Secondly, it shows that Part II apply for a number of reasons in addition to sented in Point I.

III deals solely with sales to Mineral County. g that wholesale sales are here involved, it first at Part I, Section 20, precludes Federal Power ion jurisdiction because the conditions to its are not met. Secondly, it shows that Part II does y for two reasons in addition to that presented I.

OUTLINE OF ARGUMENT.

Point I. The Federal Power Act must be c
in its entirety, giving equal weight to Parts I an
must be interpreted so as to avoid conflict bet
various sections. By applying such recognized p
of construction, the Act is found to exclude
Power Commission jurisdiction over interstate
sales by a licensee where the states directly c
have regulatory commissions and there is no
that such states are unable to agree on the ra
charged for such sales.

A. The Federal Power Act must be construe
ing to recognized rules of statutory con

B. The jurisdictional sections of the Act ap
interstate sales, Part I, Section 20, and
Section 201(b), must be construed togethe
effect to the intent of Congress. Such
tion makes Section 20 apply to interstate
wholesale by a licensee where the states
concerned have regulatory agencies a
states are not shown unable to agree on
to be charged.

1. Part II was enacted to give the Feder
Commission jurisdiction only in the
state regulation revealed by the *Attl*
cision.

2. By virtue of the Water Power Act

directly concerned had regulatory commissions and such states were not shown unable to agree on the rates to be charged for such sales.

The foregoing interpretation of the Federal Power Act applies even though part of the power sold by the licensee is derived from non-licensed sources.

Effect of existing court decisions.

Sales to the Navy.

Federal Power Act does not give the Federal Commission jurisdiction over the sales to the whether Part I, Section 20, applies, covering both sed and non-licensed portions of the energy sold, II, Section 201(b), applies, covering both the and non-licensed portions, or Part I applies to sed portion and Part II applies to the non- portion of the energy sold.

Assume Part I applies, extending to the non- censed as well as the licensed portion of the nergy. If the sales to the Navy be found to be n interstate commerce, it is enough under Sec- ion 20 that the State of California has provided commission with authority to prescribe rates harged by California Electric Power Company ecause California is the only state "directly con- erned."

state commerce, they are exempt from r
under Part II for three separate reasons
tion to that given in Point I hereof. Ar
such reasons is sufficient in itself to precl
lation under Part II.

1. The sales are not sales at wholesal
quired by Section 201(b) because the
sales "for resale" as specified in
201(d).

2. The sales are not sales at wholesal
quired by Section 201(b) for the a
reason that they are not sales to a '
as specified in Section 201(d) and a
in Section 3(4).

3. Section 201(f) provides that Part II
apply to the United States. Such lang
be construed to exempt sales to the N
regulation under Part II.

C. Assume Part I applies to the licensed p
the energy sold and Part II applies to
licensed portion.

1. As to the licensed portion, the same a
against Federal Power Commission ju
apply which are set forth in II. A. a

2. As to the non-licensed portion, the sa
ments against Federal Power Comm
risdiction apply which are set forth

. *Sales to Mineral County.* (Mineral County
er System is the name used by Mineral County,
ada, in operating an electrical distribution sys-
)

'ederal Power Act does not give the Federal
ommission jurisdiction over the sales to Mineral
whether Part I, Section 20, applies, covering
licensed and non-licensed portions of the energy
Part II, Section 201(b), applies, covering both
sed and non-licensed portions, or Part I applies
censed portion and Part II applies to the non-
portion of the energy sold.

Assume only Part I applies, extending to the non-
censed as well as the licensed portion of the
nergy. If the sales to Mineral County be found
o be in interstate commerce, the requirements of
ection 20 for precluding Federal Power Commis-
ion jurisdiction are met, because: (a) the states
directly concerned," viz., California and Nevada,
ave provided commissions with authority to en-
orce the requirements of Section 20 within their
espective states, and (b) such states have not
een shown to be unable to agree on the rates
rescribed by the California Commission.

Assume Part II applies, extending to the licensed
s well as the non-licensed portion of the energy.
f the sales to Mineral County be found to be in
nterstate commerce, they are exempt from regula-

1. The sales to Mineral County are not wholesale as required by Section 20 cause they are not sales to a "per specified in Section 201(d) and as d Section 3(4).

2. Section 201(f) provides that Part II apply to a political subdivision of a sta language may be construed to exempt Mineral County from regulation under

C. Assume Part I applies to the licensed p the energy sold and Part II applies to licensed portion.

1. As to the licensed portion, the same a against Federal Power Commission tion apply which are set forth in III.

2. As to the non-licensed portion, the sa ments against Federal Power Commi risdiction apply which are set forth i above.

In the argument which follows the number a designations correspond with those in the O Argument above.

ARGUMENT.

THE FEDERAL POWER ACT MUST BE CONSTRUED S ENTIRETY, GIVING EQUAL WEIGHT TO PARTS I II, AND MUST BE INTERPRETED SO AS TO AVOID LICT BETWEEN ITS VARIOUS SECTIONS. BY APPLY- SUCH RECOGNIZED PRINCIPLES OF CONSTRUCTION, ACT IS FOUND TO EXCLUDE FEDERAL POWER COM- ON JURISDICTION OVER INTERSTATE WHOLESALE S BY A LICENSEE WHERE THE STATES DIRECTLY ERNED HAVE REGULATORY COMMISSIONS AND E IS NO SHOWING THAT SUCH STATES ARE UNABLE GREE ON THE RATES TO BE CHARGED FOR SUCH S.

Federal Power Act must be construed according to nized rules of statutory construction.

e of its constitutional power over public lands , Sec. 3), Congress has undoubted power to sub- s by licensees, whether interstate or intrastate, tion by a federal agency or to require that they ted to state regulation. *Light v. United States,* 523 (1910); *Camfield v. United States,* 167 U.S.). Similarly, where no licensing is involved but sales in interstate commerce, Congress has, by the interstate commerce clause (Art. I, Sec. 3), d power to subject such sales to regulation by agency or to require subjection to state regula- n where the interstate commerce clause, standing uld proscribe state regulation. See *Southern Pa- v. Arizona,* 325 U.S. 761 (1944).

f it be assumed that interstate wholesale sales ensee are involved, Congress would have un-

difficulty is that Congress seems in terms to h
scribed regulation for such sales in both Parts
If *non-wholesale* sales by a licensee were involv
would be no overlap because Part II expressl
only to wholesale sales. By the same token, if
sales by a *non-licensee* were involved, there wo
overlap because Part I expressly applies only to
But, where both the *wholesale* element and the
element exist for the same sales, Parts I and
seem applicable.

The basic problem then is to find out what
meant and, in that connection, two principles of
construction may be involved, first, that a statute
read in its entirety and, second, that conflicting p
must, where possible, be so interpreted as to
the conflict.

It is, of course, true, as the Company's open
points out (pages 27-31), that Part I has an
dating back to the early 1900's and that it is e
a reenactment of the Water Power Act of 1920.
true that Part II has no such antecedents and
historical pressures which produced it were quite
and much more recent. Notwithstanding, it mu
forgotten that the Federal Power Act was enact
act in 1935 and that Parts I and II date from
There is no warrant for giving them unequal
or for presuming that Part II should be reg
subsequent legislation expressing a more recent

imited Part I to *non-wholesale* sales by licensees much ease as it might have limited Part II to e sales by *non-licensees*. In fact, it did neither. preting the Federal Power Act, it is imperative y the impression that Part II is superior. That rror into which the Court of Appeals for the of Columbia has fallen. *Pennsylvania Water and o. v. Federal Power Commission,* 193 F. 2d 230 ert. *granted,* February 4, 1952.

Parts I and II must receive equal weight, the of repeal by implication, which is frowned upon annot even be invoked.

rinciple which does properly apply is that two in an act, seemingly in conflict, must be inter- f possible, so as to avoid conflict. Such course not difficult here and is, indeed, compelled unless nent history of the legislation through Congress s to be ignored.

urisdictional sections of the Act applying to interstate Part I, Section 20 and Part II, Section 201(b), must be rued together to give effect to the intent of Congress. construction makes Section 20 apply to interstate sales olesale by a licensee where the states directly concerned regulatory agencies and such states are not shown e to agree on the rates to be charged.

rt II was enacted to give the Federal Power ion jurisdiction only in the gap in state regula- aled by the *Attleboro* decision.

repeatedly been stated that Congress enacted

Steam & E. Co., 273 U.S. 83 (1927)), but did *n*
to go beyond, leaving to the states whatever
they possessed prior to the enactment of Part
Connecticut Light & Power Co. v. Federal Pow
mission, 324 U.S. 515 (1945). This intent is cl
forth in Part II, Section 201(a), which has been
as the policy section:

> ". . . Federal regulation of . . . the sale
> at wholesale in interstate commerce is nec
> the public interest, such Federal regulation,
> to extend only to those matters which are no
> to regulation by the states."

It is even more clearly set forth in the juri
provisions of Part II, Section 201(b):

> "The provisions of this Part shall appl
> the sale of electric energy at wholesale in
> commerce, but shall not apply to any othe
> electric energy or deprive a state or state
> sion of its lawful authority now exercised
> exportation of hydroelectric energy which
> mitted across a state line. . . ."

The obvious question then is, what *was* the gap
by the *Attleboro* decision and what sales *wer*
to regulation by the states prior to the enact
Part II.

2. By virtue of the Water Power Act of 19
was no gap in state regulation prior to the e
of Part II as to interstate wholesale sales by a
provided the states directly concerned had r

ater Power Act, substantially adopted as Part I
ederal Power Act in 1935, was enacted in 1920.
d only to licensees. Therefore, it had no applica-
en the Supreme Court was faced in 1927 with
presented in the *Attleboro* case, which involved
sed power. The Court there held, *where there*
ederal statute delineating state and federal juris-
hat a state cannot regulate the rates charged by a
tric utility for current sold to a foreign electric
r resale in another state and delivered at the
ndary, inasmuch as the interstate business car-
between the two utilities is essentially national
ter and state regulation would constitute a direct
pon interstate commerce, placing a direct re-
pon that which, in the absence of federal regula-
ld be free.

s obvious that, had *licensed* power been involved
ttleboro case, state regulation would have been
oper if the two states directly concerned had
nd to have regulatory agencies and such states
been found unable to agree on the rates to be
because the Water Power Act of 1920 would
lied. In other words, a machinery already set up
ress closing the gap in state regulation would
n available. It follows that, given the conditions
in Section 20, there was no gap in the regulation
ed power prior to 1935 because Congress had
losed it. That Congress has power, if it chooses,

does not constitute an improper delegation of
sional power to the states.

Counsel for the Federal Power Commission w
tend that the gap intended to be closed by Par
sisted not only of the gap revealed in the *Attle*
where there was *no* applicable existing federal le
but a particular gap which *would* have existed
Congress already closed it. Such construction
defies the plain meaning of Sections 201(a)
quoted above, but is out of harmony with the
representations to Congress in 1935 that the pro
would not take from the states any jurisdicti
they were previously empowered to exercise. N
tion was made between power which the sta
exercise in the absence of federal legislation, a
stance, where retail rates of sales in interstate
were involved (*Pennsylvania Gas Co. v. Publi*
Commission, 252 U.S. 23 (1920)), and power
states could exercise because of already existin
legislation.

Counsel for the Federal Power Commission w
tend that, even if the gap intended to be close
consisted only of the gap revealed in the *Attl*
cision, Part II must, notwithstanding, be cons
a later expression of Congress and, therefore, c
whenever sales by a licensee are at *wholesale.*
words, counsel would argue that Part I, Sectio
plies only to sales by a licensee *at retail* since

t must fall because, as we have noted, there is nt to assume Part II expresses a later Congres- tent than Part I or that it is to be given any orce. Furthermore, there is nothing in the lan- Part I itself which would justify the conclusion vas intended to apply only to retail sales by e. Indeed, the language clearly shows that whole- s by a licensee were *particularly* contemplated. 0 reads in part:

That when said power or any part thereof shall into interstate or foreign commerce the rates ged and the service rendered by any licensee or by any person . . . purchasing power from licensee for sale and distribution or use in c service shall be reasonable . . .''

ws that upon a proper construction of the Fed- er Act, Part I, Section 20 applies to preclude Power Commission jurisdiction over interstate sales by a licensee, provided the states directly l have regulatory agencies and such states are n unable to agree on the rates to be charged. It hown that, even assuming the sales both to the l Mineral County are such sales, the conditions n 20 are met and preclude Federal Power Com- urisdiction.

C. The foregoing interpretation of the Federal Pow plies even though part of the power sold by the derived from non-licensed sources.

Section 20 reads in part:

> "That when said power [licensed power part thereof shall enter into interstate o commerce the rates charged . . . by any such . . . shall be reasonable . . ."

It will be noted that the regulation prescribed tion 20 runs to the "licensee," not merely to the licensed power by the licensee. Thus, it is in that some portion of the power which the licen is non-licensed. Once a licensee the utility is Section 20 whenever it sells power in interstate and at least a portion of that power is licensed.

Here, again, the seeming conflict with Part II 201(b), can be resolved if it is recognized that t interpretation of Section 20 was equally valid be when identical language existed in the Water Po Thus, prior to 1935, a licensee engaged in interst was subject to regulation as provided in the pr section to Section 20, both as to the portion o which was licensed and that which was not. Acc there was no gap at the time Part II was enacted fore, Part II does not apply.

Should it be found that the foregoing interpre Section 20 is too broad and allows state regula over licensed power sold by a licensee, it does n

whole is given to the federal agency under Part
argument is that it would be impractical to have
eral Power Commission regulate some fraction
ates and the states the balance; *ergo,* regulation
to the federal agency. The reverse argument
made just as plausibly: if it would be impracave federal and state agencies regulating respections of the same sales, *ergo,* regulation must go
ates. Again, counsel for the Federal Power Comlabor under the misconception that Part II is
a paramount expression of Congress to be
n case of conflict with Part I. The real solution
ndicated, in determining what Section 20 meant
the Water Power Act) prior to the enactment
II. To the extent that Section 20 closed the gap
tion, Part II does not apply.

of existing court decisions.

hree decisions have dealt with the problem here
l:

fe Harbor Water Power Corp. v. FPC, 124 F.2d
800 (3d Cir. 1941), *cert. denied,* 316 U.S. 663
(1942). Referred to as the "First Safe Harbor
Case."

fe Harbor Water Power Corp. v. FPC, 179 F.2d
179 (3d Cir. 1950), *cert. denied,* 339 U.S. 957.
Referred to as the "Second Safe Harbor Case."

nnsylvania Water & Power Co. v. FPC, 193 F.2d

licensee may be subjected to regulation unde
There, the Federal Power Commission did in fa
take to regulate under Part I, and the court
F.2d at 809):

> ". . . whether or not the Federal Power Co
> has jurisdiction over Safe Harbor as a pub
> transmitting and selling electric energy at
> in interstate commerce under the provision
> II . . . is immaterial. The Commission has
> fix the rates charged by Safe Harbor unde
> thority which Section 20 confers upon it wi
> to licensees of water power projects upon
> rivers which is an entirely different basis fo
> jurisdiction."

In that proceeding the order of the Federal Co
was set aside as beyond its jurisdiction because
no showing that the respective states were unable

In the *Second Safe Harbor Case* the facts sh
the states directly concerned *were* unable to agre
fore, Federal Power Commission jurisdiction la
less of whether the court construed the Feder
Act to make Part I applicable or Part II. The
pressly left the question open because it found
sistency between Parts I and II in certain valu
tions which had to be applied. Said the court
at 186):

> "It can be argued with some plausibility
> since Safe Harbor is a 'licensee' it must be
> as such even though it is also a 'public uti

ons 205, 206 and 208, Part II, are not conflicting
consistent."

rgument above shows, we are in general agree-
h the Third Circuit's approach of seeking to
Parts I and II of the Act. However, we contend
pplying such approach Part I alone applies to
sales in interstate commerce by a licensee. The
not have to decide the question because the
uld have been the same in either event. The
rue in the proceeding here.

Pennsylvania Water case the Court of Appeals
District of Columbia has taken the view that
wholesale rates by a licensee are subject only
II. However, the court's whole argument pro-
on the erroneous premise that Part II repre-
later expression of Congressional intent than
The United States Supreme Court has granted
.

tters stand, the Third Circuit and the District
bia Circuit have taken inconsistent approaches
g the interrelation of Parts I and II. The pro-
ere presents another opportunity for a consider-
hat problem.

POINT II. SALES TO THE NAVY.

THE FEDERAL POWER ACT DOES NOT GIVE ERAL POWER COMMISSION JURISDICTION SALES TO THE NAVY, WHETHER PART I, S APPLIES, COVERING BOTH THE LICENSED LICENSED PORTIONS OF THE ENERGY SOLD, O SECTION 201(b), APPLIES, COVERING BOTH THE AND NON-LICENSED PORTIONS, OR PART I A THE LICENSED PORTION AND PART II APPLI NON-LICENSED PORTION OF THE ENERGY SOLD

A. Assume only Part I applies, extending to the non well as the licensed portion of the energy. If the Navy be found to be in interstate commerce, i under Section 20 that the State of California has commission with authority to prescribe rates California Electric Power Company because C the only state "directly concerned".

It may be urged parenthetically that the sa Navy are in *intrastate* commerce since they ar mated wholly within the state, where delivery and since the purchaser is an arm of the fe ernment. If that conclusion is correct, then, Federal Power Commission jurisdiction lies, eit Part I or Part II. That much would be ad counsel for the Federal Power Commission.

The argument herein, however, will be prem the assumption that even the sales to the Na interstate commerce.

If it be further assumed that Part I is the part, as indeed we demonstrated in Point I, pr conditions of Section 20 are met, then, to preclu

ection 20, Congress has conferred jurisdiction Federal Power Commission only if:

any of the states "directly concerned" not provided a commission or other authority to ce the requirements of Section 20 within such " ("requirements within such state" apparently ring to the provision that the rates and serv- y licensees or persons purchasing from licensees esale in public service shall be reasonable), and

even though the requisite state commissions her authorities have been provided, only if the "directly concerned" are "unable to agree" e service or rates through their properly con- ed authorities.

ase of the sales to the Navy, California is the e "directly concerned" since Nevada has no n over the Navy, either as to the rates the Navy alifornia Electric or as to the rates the Navy ts tenants. The mere presence of the Naval n within Nevada does not make Nevada "di- cerned," for that phrase has obvious reference uation where the state's concern relates to the or the charges by, its own citizens or residents. is "directly concerned" only because Cali- ectric Power is a company engaged in selling within the state.

dly, the California Public Utilities Commission l of state commission contemplated in condition e, for it has broad powers over the rates of

California Public Utilities Code, Stats. 1951, ch
201, et seq., as amended.

Since only one state is "directly concerned,"
tion can arise of inability as between two state
concerned to agree on the reasonableness of
charged to the Navy.

It follows that Federal Power Commission ju
is precluded because neither of the conditions t
cise as prescribed in Section 20 is present.

B. Assume Part II applies, extending to the licensed non-licensed portion of the energy sold to the N sales are found to be in interstate commerce, they from regulation under Part II for three separate addition to that given in Point I hereof. Any reasons is sufficient in itself to preclude regula Part II.

1. The sales are not "sales at wholesale" a
by Section 201(b) because they are not sales "f
as specified in Section 201(d).

Part II, Section 201(b) declares that:

> "The provisions of this Part shall app
> the sale of electric energy at wholesale in
> commerce, but shall not apply to any oth
> electric energy . . ."

The phrase "sale of electric energy at wholesa
fined in Section 201(d) to mean a "sale
energy to any person for resale."

As noted in the brief of California Electric Po

use of the Government's Ammunition Depot."
ence showed that the use in fact made of the
s been consistent with such language. All of
is consumed on the Naval reservation; part is
e Depot's industrial operations; the balance is
he individuals and business establishments lo-
he reservation. Individuals may reside or con-
ess only so long as their presence is consistent
Navy's obligations. The lease agreements with
pying "public quarters" and with those occu-
low-cost housing project known as Babbitt, both
at the rental privilege ceases upon termination
ment by the Government. For the business con-
he Government issues a "Revocable Permit"
hat the concession is "for accommodation of
of the Depot."

t, all those who receive electricity from the
tenants at will, whose tenure depends solely
eeds of the Navy landlord. The Navy does not
public utility in furnishing electric service. It
merous occasions been held that public utility
bsent where the service is confined to tenants.
onas v. Swetland, 119 Ohio St. 12, 162 N.E. 45,
D 825 (1928), it was held that, where a realty
supplied electricity under contract to tenants
t hold itself out to the public generally, it was
blic utility. In *Re Fulton,* PUR 1930D 11
), it was said that the jurisdiction of the Mis-
lic Service Commission did not extend to the

to tenants through submeters. In *Holdred C*
Boone County Coal Corp., 97 W. Va. 109, 12
(1924), it was held that a coal company furni
tricity under contract to lessees was not a pu

Quite aside from the landlord-tenant relatio
Navy as an arm of the federal government wo
fall within the category of a public utility. Con
thermore, has never authorized it to engage i
of electric energy to the public generally.

In construing what Congress meant in using
"sales at wholesale" and "sales for resale" i
it must again be remembered that that Part w
to fill the gap revealed in the *Attleboro* case.
ously noted, that decision dealt with sales by
utility to another *public utility* for resale by
Certainly, Congress did not intend the Act,
adopted, to apply to a situation where the res
in public service. The underlying purpose of P
to provide protection to ultimate consumers
public utility service by providing that a fede
should regulate the interstate wholesale rates
states were prevented from doing so by the
commerce clause. It must be presumed that
the Navy do not need to be protected agains
providence of the Navy in negotiating contra
purchase of energy. This is especially true b
charges by the Navy to its tenants are not l
cost plus a "fair return". It must be further
that the Navy itself does not need the guidin

then that the Navy "resells" some of the
purchases, it is clearly not the kind of "resell-
mplated by Part II.

onnection reference may be made to the com-
ly Brief (p. 15, et seq.) in which it is pointed
even if "sales at wholesale" and "sales for
re to be given a broader meaning than it is
ongress intended and that sales to tenants by
are to be included, it still would not entitle
l Power Commission to claim jurisdiction over
purchases by the Navy. The energy sold to
is a small fraction of the energy purchased
rmore, such fraction can be readily calculated.
nterstate Gas Co. v. FPC, 185 F(2d) 357 (3d

sales are not sales at wholesale as required by
1(b) for the additional reason that they are
o a "person" as specified in Section 201(d)
ned in Section 3(4).

for the Federal Power Commission admit that
the Navy do not literally fall within Part II
"sale of electric energy at wholesale" is de-
ction 201(d) to mean "a sale of electric energy
son for resale" and the Navy falls outside the
f "person" in Section 3(4). Counsel explain
neaning as a "quirk of draftsmanship utterly
" (Brief for Respondent, p. 21), and indulge
tation of legislative history which is intended

construction of a statute. Further on, counsel
in considering "the policy of the Act as a wh
clear that Congress could not have intended
from the regulation of Part II sales to the
Mineral County). At that juncture, as elsewh
brief, a dissertation is launched upon which i
if at all, only to one of the two types of sales i
in this instance, sales to Mineral County. C
possibly wish this Court to look upon the
municipality or similar political subdivision?
argument is that to exempt sales to a municip
regulation would mean that "Congress inten
prive consumers served by the thousands of
owned distribution systems, of the protection i
viding from unjust and unreasonable interst
(Brief for Respondent, p. 23.) Obviously, the
is utterly irrelevant to the Navy. The Navy has
duty of entering into electric purchase contra
they are fair, regardless of any efforts by t
Power Commission to intervene. Furthermore
charges its tenants for electricity supplied upo
basis it deems proper, and, as shown in the i
ceeding, the charge is determined upon some
than the cost to the Navy plus a fair return.

That counsel for the Federal Power Commi
themselves not have much faith in the argu
espouse is indicated by the precisely opposi
taken by them in a brief filed in August, 1951,

nia Electric Power Company have quoted from
at length in their opening brief. (Opening Brief,
We take the liberty of requoting a portion:
son' is limited in Sec. 3(4) to mean an 'indi-
or corporation.' This alternative definition ex-
the United States. For the United States is
neither a corporation nor an individual.

e of the word 'person' elsewhere in the Act
as this definition. As used throughout the Act,
rd 'person' cannot include the United States.
d, absurd or impossible situations would arise;
ensing provisions of the Act would apply to
my Engineers, Bureau of Reclamation, T.V.A.
her agencies of the Federal Government; pro-
of Part II of the Act relating to rates and
s in interstate commerce would apply to the
ary of the Interior, T.V.A., and other Federal
es.''

on 201(f) provides that Part II shall not apply
ted States. Such language may be construed
sales to the Navy from regulation under

ne California Commission in its Decision No.
ed on page 2 above, relied upon sections
201(f) in reaching the conclusion that Part
t apply to the sales to the Navy, a forceful
was made by the company in its brief before
ive federal and state regulatory agencies that

36-39). It is so ably put that we take the liber
it in part (Tr., pp. 37-39):

"... the regulation by this Commissio
of electric energy, and the rates charged
the sovereign—Federal or State—thereby
sity limits the freedom of action of nego
purchase of electric energy by the sove
would thereby cause provisions of Part II
to the United States, a State or any poli
vision of a State, and such action would
United States, a State, or any political
of a State to be deemed to be included in
of the provisions of Part II of the Act.
ticular reference to the National Gover
intent seems clear that this agency not
affirmatively authorized, in its regulation
of electric energy at wholesale under P
supervise, directly or indirectly, the purch
tric energy by the National Governme
agency, authority, instrumentality, officer
employee acting as such in the course of
duty, but is expressly prohibited from t
action. In brief, under Part II this Com
an agency of the National Government, is
ized to supervise or accomplish by indi
limitation of the freedom of action of th
Government or any of its agencies or age
chase electric energy at whatever price ca
tiated in direct negotiations. Although
the Department of the Navy requests th
sion so to act, it must be remembered tha
diction of this Commission rests upon ex

Department of the Navy or any other depart-
agency or agent of the National Government
han Congress as expressed by a duly enacted
."

er support of the position herein, reference
le to the company's opening brief, pages 63, 64.

**Part I applies to the licensed portion of the energy
Part II applies to the non-licensed portion.**

o the licensed portion, the same arguments
deral Power Commission jurisdiction apply
set forth in II. A. above.

the non-licensed portion, the same arguments
deral Power Commission jurisdiction apply
set forth in II. B. above.

going propositions are self-explanatory. How-
inted out in I. C. above, we do not agree with
assumption herein and contend that Part I
construed to apply to both the licensed and
l portions of the energy sold by the "licensee"
Electric Power Company.

POINT III. SALES TO MINERAL COUNTY.

THE FEDERAL POWER ACT DOES NOT GIV
ERAL POWER COMMISSION JURISDICTION
SALES TO MINERAL COUNTY, WHETHER PAR
20, APPLIES, COVERING BOTH THE LICENSE
LICENSED PORTION OF THE ENERGY SOLD,
SECTION 201(b), APPLIES, COVERING BOTH TH
AND NON-LICENSED PORTIONS, OR PART I
THE LICENSED PORTION AND PART II APPI
NON-LICENSED PORTION OF THE ENERGY SO

A. Assume only Part I applies, extending to the n
well as the licensed portion of the energy. I
Mineral County be found to be in interstate c
requirements of Section 20 for precluding F
Commission jurisdiction are met, because: (a
directly concerned, viz., California and Nevad
vided commissions with authority to enforce
ments of Section 20 within their respective st
such states have not been shown to be unable
the rates prescribed by the California Commiss

In Point I above, it was demonstrated tha
the Act is, indeed, the applicable part, provid
ditions of Section 20 thereof are met. Such
were previously set out in Point II. A, on pag
in discussing the sales to the Navy, and it
determine whether they are met in the sales
County.

First, have the states "directly concerned"
commission or other authority to enforce the r
of Section 20 "within such state"? The answe
yes, as the following discussion will demonstr

California and Nevada are admittedly the

ia. Nevada's direct concern arises from the
e purchaser is a political subdivision of that
at such purchaser is engaged in public service
ie electricity, purchased in California, to citi-
sidents of Nevada.

has a regulatory commission, the California
ities Commission, which has broad powers
tes, wholesale and retail, of electric utilities
within the state. California Public Utilities
tes 1951, chapter 764, Section 201, et seq., as

Nevada Public Service Commission does not
great control over Mineral County as it does
e organizations engaged in public service in
nevertheless has express jurisdiction over
unty's rates. It should be noted in passing
l County in its electric operations is desig-
ral County Power System. Nevada Statutes
vide at page 55:

6. The maintenance and operation of said
County Power System shall be under the
supervision and authority of the board of
rs and rates charged to consumers for sale
tribution of electric energy and current, and
s from telephone service, with the terms and
ns thereof, shall be fixed by said board, *sub-*
supervision of the Nevada Public Service Com-
, who may revise, raise or lower the same."
asis added.)

the requirements of this section [Section 20] v
Sfate.'' The California Commission has juri
prescribe reasonable rates, wholesale or ret
charged by public utilities operating within
The Nevada Commission has jurisdiction to
reasonable rates to be charged by Mineral
selling to citizens and residents of Nevada.
commission has ''authority to enforce the re
of this section [Section 20] within such state
respective state.

The staff of the Federal Power Commissio
parently unaware of the Nevada statutory
quoted above prior to the hearing and one o
wondering whether the order to show cause
been issued if the Nevada law had been fully
any event, staff counsel attempted at the hear
offer of extraordinarily incompetent evidenc
that the Nevada Public Service Commission di
jurisdiction over the rates of Mineral Cou
System.

Such counsel now seem tacitly to admit th
dence was, indeed, incompetent and that t
Public Service Commission *has,* pursuant to th
provisions quoted, jurisdiction over the rates
Mineral County Power System. (Brief of Res
39.) They now come up with the propositio
Nevada Public Service Commission does not qu
Section 20 because it is not constituted ''wit

, p. 38.) Certainly, that is a requirement which
e statute, and the only basis for espousing it
isconstruction of the second condition of Sec-
vhich counsel apparently indulge. We turn to
tion of that second condition.

ıd in the following language in Section 20:
ch States are unable to agree through their
y constituted authorities on the . . . rates or
. . . ''

ower Commission counsel contend that this
ontemplates an obligation on the part of the
tly concerned affirmatively to agree, in this
h their utilities commissions, on the fairness
esale rates. Going back to the first condition,
tend that the utilities commissions, to qualify
on 20, must have express authority from their
tates to enter into such affirmative agreement.

struction of Section 20 errs in two respects:
ding into the first condition the requirement
ate commissions, to be qualified, must have
gree affirmatively respecting wholesale rates
other state, whereas all the statute says is
te commission must have authority to fix rea-
es ''within such state,'' and (2) by imposing
ve duty on the sister state to agree on the
ate approved by the other, whereas the statute
the other way around by saying that the Fed-

to agree in order to preserve local jurisdiction
state's mere *failure to disagree* precludes Fed
Commission jurisdiction.

Even counsel for the Federal Power Comm
gest the Third Circuit may have gone afield in
that Section 20 envisages affirmative agreem
the compact clause of the Constitution (Art.
Ch. 3). *First Safe Harbor Case,* p. 21, supra
Respondent, p. 35.) Counsel say an affirma
ment is contemplated, though they question v
under the compact clause. We contend that no
agreement of any kind is contemplated by the
only an absence of disagreement, to preserve
diction.

To summarize, it is submitted that, if the pla
of Section 20 is to be respected, the condition
in Section 20 which *preclude* Federal Power
jurisdiction are as follows:

(1) The existence of state commissions in
directly concerned with authority t
reasonable rates for electric utility se
their respective states. No further
is required. And:

(2) The absence of disagreement betwee
directly concerned. After a wholesa
interstate commerce by a licensee has
mined by one state, mere silence on
the sister state is enough to preclu

r it sees fit merely by voicing disagreement
ough any properly constituted authority, in-
ding the legislature itself.

rpretation not only follows the natural mean-
language of Section 20 but implements the
ongress to make Federal Power Commission
applicable only where one or the other of
directly concerned believes that its interests
opardized.

acts there can be no question that the staff
eral Power Commission failed to show an
disagreement. No evidence whatever was
pecting any course of dealing, or an absence
ween the California and Nevada commissions,
any other authorities of the respective states.
an of the Nevada Public Service Commission
e concurrent hearing that his Commission had
not to participate in the cooperative proced-
; he would appear only as an interested party.
stated (Tr., p. 153):

State of Nevada, therefore, is not interested
to the extent that the users are living in Ne-
d, therefore, I will say that we are very much
ed. I am not prepared to state at this time
e position of our Commission would be, until
his matter of jurisdiction has been decided.
all the statement I wish to make."

B. Assume Part II applies, extending to the licens the non-licensed portion of the energy. If the eral County be found to be in interstate comm exempt from regulation under Part II for reasons in addition to that given in Point I he

1. The sales to Mineral County are not sal sale as required by Section 201(b) because t sales to a "person" as specified in Section 20 defined in Section 3(4).

Reference may here be made to the corres cussion in Point II. B. 2, supra, pages 29-31, the sales to the Navy. It was there point counsel for the Federal Power Commission the literal meaning of the statute is to be igno to exempt sales to a municipality from regul mean that "Congress intended to deprive served by the thousands of municipally own tion systems, of the protection it was pro unjust and unreasonable interstate rates." T has no merit. It ignores the distinction betw and governmental bodies; it presupposes th governed by the same motives. Utilities are to make money, and if they agree to mak purchases at an improvident rate, they pass to the retail consumers. Municipalities or ot subdivisions of a state are not in business to but only to serve their consumers. The same d provident wholesale rates does not exist. T Congress in enacting Part II was to protec

l protector, and their consumers are amply
those municipalities.

urprising to find that Congress by its express
ded from Federal Power Commission jurisdic-
Part II, sales to a political subdivision of a
II was enacted to close the gap of non-regula-
ng wholesale transactions between one private
another, not between a private utility, on the
nd the state or a political subdivision there-
her.

n 201(f) provides that Part II shall not
olitical subdivision of a state. Such language
trued to exempt sales to Mineral County from
nder Part II.

reasoning applies here which was set forth
B. 3. above relating to sales to the Navy.

**Part I applies to the licensed portion of the energy
Part II applies to the non-licensed portion.**

the licensed portion, the same arguments
deral Power Commission jurisdiction apply
et forth in III. A. above.

the non-licensed portion, the same arguments
deral Power Commission jurisdiction apply
et forth in III. B. above.

going propositions are self-explanatory. How-
nted out in I. C. above, we do not agree with
ssumption herein and contend that Part I

CONCLUSION.

For all of the above reasons, it is submitt
Federal Power Commission has erred in asse
diction. The challenged order should be set as

Dated, San Francisco, California,
March 28, 1952.

Respectfully submitted,
EVERETT C. MCKEAGH
BORIS H. LAKUSTA,
WILSON E. CLINE,
Attorneys for Public Utilities
of the State of California
Curiae.

(Appendix A Follows.)

Appendix A.

Decisions

of the

fornia Public Utilities Commission

	Page
ssoc. Telephone Co., rate increase	727
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ione Company, Ltd., granted an estimated annual gross increase in 750,000 to produce an estimated rate of return of 6.1% during the riod after the effective date of the order.

AND TELEGRAPH UTILITIES—CONSTRUCTION AND OPERATION OF FACILITIES—COMMISSION JURISDICTION. A program of curtailing of new telephone plant, as an anti-inflation measure would not ublic approval in a state that is expanding and growing as rapidly as of California.

ND TELEGRAPH UTILITIES—RATE BASE—VALUATION—PARTICULAR —LAND AND BUILDINGS. The inclusion of interest on land is con- the established practice of charging overhead costs to plant charges construction period. Prior to the structural capital expenditures, of the associated land is required and necessitates capital investment des interest on the funds required prior to date of operation. This n should be capitalized as an asset on the books of the company and determining costs for rate-making purposes.

AND TELEGRAPH UITLITIES — RETURN — SPECIFIC ALLOWANCE. should be given to the declining rate of return attendant upon the the investment in plant. Applicant's operating revenues should be an amount which will produce a return of 6.1% on an annual basis. ast applicant's outstanding securities and those proposed to be issued , such a return should produce net operating revenues sufficient to necessary capital and to enable applicant to proceed with its construc- n.

rances and list of witnesses are set forth in Appendix "1")

OPINION

Telephone Company, Ltd., a California corporation, his proceeding, by the above-entitled application, filed 50, asked authority to increase its telephone rates and annual amount of $3,241,200. On February 1, 1951, appli- irst amended application requesting that this amount be 5,757,600 by reason of changed conditions. The original s based upon conditions as they existed prior to June 25, of the incidence of the Korean war, which did not reflect ral tax rates, increased toll revenues, government restric- f copper, and increases in the rate of turnover among ployees. At the public hearing on April 5, 1951, applicant evidence Exhibit No. 46, which lowered the requested 545,000 after giving effect to an increase in toll revenue ,200 and an increase of $192,700 in miscellaneous revenue, on in the directory advertising revenue estimate.

of public hearings were held upon the first amended appli- Commissioner Huls and Examiner Edwards during Feb- April, and May, 1951. All hearings were held in Los t for one day, March 2, 1951, when the hearing was held

oral argument on May 9, 1951.

This rate increase proceeding is not the first for this
the beginning of the postwar inflation in wages and prices.
1949, by Decision No. 43423 in Application No. 30339, th
granted this utility an interim increase in the amount of
annum. On May 2, 1950, by Decision No. 44135 under the
tion number, an additional increase of $2,200,000 in gros
granted. It was estimated that the utility would earn 5.9
base of $70,035,000 for a full year at the 1950 level of busin
claims that in 1950 it earned only 4.45% and did not rea
the Commission had estimated for the full year because
were effective for only seven months of 1950 and becaus
vening wage increase of $195,600 annually. The compa
return computed by the Commission's staff for the actual
4.97%. Applicant now claims that its rate of return is a
and that for the full year of 1951 it will fall to approximat

The Associated Telephone Company, Ltd., is engaged
of furnishing public utility telephone service to approxi
telephone stations in 34 exchanges located in the Counties o
Orange, San Bernardino, Santa Barbara, Ventura, Tula
Fresno. All but three of the company's exchanges have b
to dial operation. The area in which applicant renders tel
has witnessed a phenomenal postwar growth in populatio
of stations served by this utility has grown from 215,939 a
31, 1946, to 422,834 as of December 31, 1950. Accompany
increase in the number of stations has been an even shar
the amount of plant in service from $33,093,340 to $90,30
mand for new service continues unabated as indicated by
as of January 20, 1951, applicant's held orders were 21,9
New home construction in its service area has continued t
defense restrictions on certain types of new buildings.

Company's Position

Because of the fact that it has been necessary for app
to increase its plant at high unit costs for labor and mate
to prewar prices, applicant claims it will not be possible
ficient rate of return at present rate levels to enable it to se
adequate prices for financing plant expansion. Furthern
operating expenses have increased out of proportion to re

ss construction in the amount of $25,914,100, which will
rage investment in 1951 to an approximate figure of $228
verage total operating expenses, including depreciation and
ion have risen from $44.26 in 1946 to $45.83 in 1950, and to
total of $48.82 in 1951. The average total operating rev-
ion have increased from $51.39 in 1946 to $53.25 in 1950,
are estimated at $55.11 at present rate levels.

t requests that its telephone service rates be raised to a
l result in a rate of return of 6.5% on its rate base at the
business. Its proposed increase of $5,545,000, largely pro-
signed to the local service classification, represents a rate
3% on the average, being equivalent to an approximate in-
per year per average station. The amount of increase in
osed by applicant, is not uniform for classes and grades of
hanges. Applicant suggests that the exchanges be classified
ps for local service and two groups for extended service
ons accessible to subscribers in an exchange, as shown on
table:

APPLICANT'S PROPOSED BASIC RATES

	Business Service			*Residence Service*		
le	*Indiv.*	*2-Party*	*4 Party*	*Indiv.*	*2-Party*	*4-Party*
s	*Line*	*Line*	*Line*	*Line*	*Line*	*Line*
			Local Service			
500__	$6.75	$4.25	$4.00	$6.00	$4.00	$3.75
,000__	7.00	4.50	4.25	6.00	4.25	3.75
,000__	7.25	4.75	4.50	6.00	4.50	3.75
,000__	7.50	5.00	4.75	6.00	4.75	3.75
,000__	7.75	5.50	__	6.00	5.00	3.75
			Extended Service			
,000__	8.50	6.25	6.00	6.50	5.35	4.00
000__	10.50	7.50	7.25	6.50	5.35	4.00

t's proposed rates are fully set forth in Exhibit E of the
d, in addition to the above schedules, contain proposals on
suburban, and message unit services.

esentation

r representatives were present at each of the hearings and
ted testimony relative to various phases of the case pre-
applicant. Testimony or statements were presented by the
minent public officials: State Senator Cunningham of San
ounty, Supervisor Marion A. Smith of Santa Barbara
Fletcher Bowron of the City of Los Angeles, and Mayor

install high cost buildings during the present period of hi
material prices; steps should be taken by the company to
eral nationwide inflation in prices and wages; applicant's p
would result in removal of telephones; telephone service an
be comparable with those applicable to other similar areas

The applicant's position relative to these matters was:
exchanges fluctuates annually and it cannot be said fairly
exchange is carrying the others, and particularly in Oxn
proposed rates will justify the capital involved; buildings
for show or to have excess spare room but rather, adequatel
necessary telephone equipment; the dial switching equi
mendously more expensive than the buildings and undue r
taken where fire hazard is high and humidity, which mi
affect service, cannot be controlled.

The utility is the victim of inflation as is the public
generally. Applicant's prices must be kept current if it is
type of service the public is demanding. The only contribu
company stated it could make to halt the inflation spiral wo
construction of all telephone plant and not provide new ser
demanding it.

[1] We are of the opinion that such a program of c
struction of new telephone plant, as an anti-inflation measu
meet with public approval in a state that is expanding an
rapidly as is the State of California.

In addition to the testimony of the public officials, t
presented by representatives of other organizations and cit
mission also received a number of letters protesting the pro
in rates. These letters were summarized and classified as to
under several general headings by a Commission staff engi
sented as part of a service investigating report. Exhibit No
subjects were covered by such letters and by subscriber re
that it is not practicable to list herein the detailed consid
to each subject other than in a general way. The represe
California Farm Bureau Federation testified that service
area has been improving rapidly and that the farmer is w
the rates which the Commission finds are proper. However
out that the rate for business suburban service is too low
residence service based on the relative usage. Suburban bu
are generally located along a highway where the public

d to investigate and follow up any complaints regarding
e the subscribers had given sufficient specific facts to indicate
the trouble. The company observed generally that most of
dicated dissatisfaction because of overloaded central office
his condition in large part now has been corrected. Another
ce of complaint is the provision of party lines service to per-
e requested individual line service. Solution of this problem
the utility's ability to raise capital and install additional
Certain subscribers had individual difficulties which the
equested to correct. Other letters advanced carefully pre-
tions which the Commission will attempt to carry out in
acticable.

mony of several subscriber representatives contained sug-
ive to the improvement of service conditions. Such testi-
weighed with all the evidence presented in this case, and
consistent with the economics governing the rendition of
vice, such suggestions will be adopted.

arnings

applicant and the Commission's staff presented estimates
gs of the Associated Telephone Company for the year 1951.
es, which are summarized in the succeeding table, show
result if the present rates were to be effective for the full
at would result if the proposed rates were effective for the
ear as indicated.

ESTIMATED EARNINGS IN 1951

	Company Exhibit No. 46		*Staff Exhibit No. 50*	
	Present Rates Full Year	*Pres. Rates First 4 Mos. Pro. Rates Last 8 Mos.*	*Present Rates Full Year*	*Pres. Rates First 6 Mos. Pro. Rates Last 6 Mos.*
nues ____	$24,265,400	$27,979,800	$24,642,000	$27,454,000
nses ____	13,074,700	13,074,700	13,069,500	13,026,500
_____	3,892,200	3,892,200	3,850,000	3,850,000
_____	4,431,300	6,281,100	4,473,900	5,895,400
enses ___	21,398,200	23,248,000	21,393,400	22,771,900
_____	2,867,200	4,731,800	3,248,600	4,682,100
preciated)	86,615,564	86,615,564	82,148,000	82,148,000
_____	3.31%	5.46%	3.95%	5.70%

on to the above figures, each exhibit contained a hypothetical
re for the year of 1951, assuming applicant's proposed rates

of the rate base. The staff's estimate of revenue for the present rates is approximately 2% greater than the compa penses less by .02% and the rate base approximately 5% sm basis of part of the year at present rates and part at pro the staff's estimates of revenue and expenses are approxima than the company's, being accounted for by the fact that th estimates reflected two additional months at proposed rat did the staff's.

The company took no particular exception to the staf of revenues and expenses but did develop on cross-examina that the salary increase of $200,000 conditionally granted employees of the company effective May 1, 1951 would lo of return by about 0.1% below that shown in the staff's e company conditioned this salary increase on authorizatio tained from the National Wage Stabilization Board. An pointed out by the company that might also adversely affe ings would be a possible future increase in wages. The uni the bargaining agent for the company's wage-earning empl the company with 60 days' written notice on May 1, 1951, to amend the contract currently in force. Such possible a not reflected herein. For the purposes of this decision, the mates of revenues and expenses will be adopted, after adj the expense effect of the $200,000 salary increase.

Applicant claims that its salary levels prior to incre May 1, 1951 were below the salary levels paid by other pu in Southern California. On the other hand, it claims that a proper level since the wage earners are, and for severa have been, compensated on the same general level as simil elsewhere in the telephone business in Southern California. representative testified that in these times of rapid growth and plant and of increasing manpower problems, its succ taining efficient and economical operations is in a larger ever dependent upon the enthusiastic loyalty of salaried pe

Depreciation

The depreciation expense allowance by the staff was w the company's estimate. The reason for the close agreement company used the rates based on the lives recommended by the prior rate proceedings under Application No. 30339. T

nd salvage factors on its telephone plant. As a result
ant's president reported on March 8, 1951, that the com-
blished a Valuation Division which is now engaged in
rtality statistics for the express purpose of computing
epreciation expense and determining the adequacy of its
eserve. In future years the company plans to spread the
undepreciated cost of the plant less estimated net salvage
ning life of the plant. Furthermore, no adjustment in the
present reserve will be sought. Applicant's studies are
advanced to determine depreciation allowances at this
aining life basis.

tal taxes in the amount of $3,610,847 recorded in 1950,
County taxes amounted to $52.5%, State taxes, 9.2% and
38.3%. In addition to these taxes, the company collected
ne federal government $5,556,233 collected from its sub-
senting federal excise taxes levied on exchange and toll
he total taxes payable to all taxing authorities amounted
verage station per month during 1950.
estimates of taxes are substantially above the $3,610,847
ld be higher still under the assumption that the proposed
were to be effective only for part of the year. The reason
increase is due to the effect of the current federal income
rger net revenue. In 1950, on large utility corporations,
eral income tax rate of 42% was effective which for 1951
47%.

company and Commission staff witnesses introduced
ing rate bases for various periods. The differences in
for the estimated year 1951 are due, in general, to the
s:
nates of plant additions for the year are in the main spread
e company uniformly throughout the year whereas the
used two months actual and estimated completion dates
he balance of the year in the weighting given capital
ions.
staff figures reflect interest on land during the construc-
period, while the company's procedure was to include in

tion of $69,000 in the weighted average rate base.
sion of interest on land is consistent with the est
tice of charging overhead costs to plant charg
construction period. Prior to the structural ca
tures, acquisition of the associated land is require
tates capital investment which includes interest
required prior to date of operation. This interes
be capitalized as an asset on the books of the
included in determining costs for rate-making

(c) The allowances for non-interest-bearing constru
progress differed materially due to differences i
approach. The applicant, in preparing its figure
1950 "Recorded", based the interest-bearing p
estimate of the monthly charges of interest durin
and deducted this from the total construction wo
to give the non-interest-bearing portion. This v
base for their estimates for 1951. The staff base
for the year 1951 upon a study of the actual
bearing construction work in progress experience
addition, the company's interest during constru
culated at a 6% rate as against a 5% rate adopte

(d) The record shows the justification for the inclusi
mately $420,000 reflecting routine project expend
year 1951, which did not appear specifically in t
mate.

COMPARISON OF RATE BASES
1951 ESTIMATED *

	Company Exhibit H	*Staf Exhil No.*
Plant		
Telephone Plant	$99,331,000	$98,167
Non-interest-bearing CWIP	3,731,000	585
Property Held for Future Use	51,000	70
Total Weighted Average Plant	103,113,000	98,822
Adjustments		
Contributions of Tel. Plant	(893,000)	(897
Intangibles	---	(49
Recomputation of Int. at 5% on CWIP and Land	---	(19
Total Weighted Avg. Adjustments	(893,000)	(965
Working Capital		
Material and Supplies	3,304,000	3,278
Working Cash	750,000	750
Total Working Capital	4,054,000	4,028
Total Weighted Average Rate Base	106,274,000	101,885
Deduction for Depreciation	19,658,000	19,737

method of handling the above items, with the addition noted, will be accepted for the purpose of this decision ce will be made for routine projects. For the purpose of for the estimated year 1951 an average weighted depre- of $82,500,000 is adopted.

s request for increased rates is predicated, among other uested return of approximately 6.5% on an average rate r 1951 of $86,615,564. Counsel for the City of Los Angeles return of 5.25% using a smaller rate base, while a wit- on behalf of a group of cities which are served by appli- t in his opinion the rate should not exceed 5.5%.

contains testimony and exhibits setting forth applicant's ence, its method of financing its properties and its earn- nds, as well as information including trends of interest outstanding securities of other utility and industrial ings on invested capital, and the trends of such earnings ed utility companies, comparative risk data so far as the stry and the electric industry are concerned, and esti- requirements to service applicant's outstanding and of stock and bonds. A witness called on behalf of appli- hat in his opinion net income of $5,992,241 would be vide the coverage of interest and dividends necessary onal sales of preferred stock, to produce earnings of $2.90 common stock and, generally, to maintain applicant's ss for the City of Los Angeles estimated that the com- uire net earnings of $4,985,567 in order to service the urities and those proposed to be issued, including in his ever, an assumed dividend rate of 6.5% on the common vitness presented financial statements and data pertain- f money and, using an assumed capital structure includ- %, concluded that a return of 5.5% would enable appli- % dividend and to carry additional sums to surplus.

applicant's practice, in financing the cost of its prop- and sell bonds and preferred stock to the public and to s shares of common stock, at par, to General Telephone t present, its capital structure consists of 54% bonds, stock, and 24% equity capital. Applicant is of the opin- d reduce its debt ratio and it plans to issue, during 1951

1951 by Decision No. 45846 in Applications Nos. 32412 an
cant's program, if fully consummated, would result in
capital of approximately 50% for bonds, 24% for prefe
26% for common stock.

It is evident that applicant will continue to be face
tial new capital expenditures into 1952.[1] These plant
under today's inflated costs of labor and material, re
revenues to provide a fair return. Furthermore, the ta
creases, imposed or permitted with the approval of the
ment, must be reflected in rate increases if the utility is
rate of return.

In considering the record in this proceeding, it clear
applicant will have need for additional revenues if, unde
and tax levels, it is to enjoy a fair return on its invest
proceed with the financing of required extensions and
properties. We are of the opinion that recognition sho
the declining rate of return attendant upon the increas
ment in plant, and, after a full review of the matter w
applicant's operating revenues should be increased by
$4,750,000 on an annual basis, which, under present wag
in our opinion, will produce a return of 6.1% during the
period, based on the projection of the average year 1951 e
of operation. Tested against applicant's outstanding secu
proposed to be issued during 1951, it appears that such
produce net operating revenues sufficient to attract the n
and to enable applicant to proceed with its construction

In our opinion, based upon the record in this matter,
authorized are justified and the return to applicant on it
fair and reasonable.

Authorized Rates

In spreading the increases in rates, we have attempt
a balance as between districts and exchanges taking int
sizes and any peculiar conditions of the territory that n
cost of providing service. Rate levels and differentials as
of service on other systems serving somewhat compara
have been considered. The contentions of the subscribers
resentatives are also reflected in the rate levels in so fa
with the economic problems involved.

ontained in Exhibit No. 17 is incompetent and immaterial
n this proceeding. However, it is evident that an indication
e earning positions of the exchanges by geographical areas
ed from the exhibit, and the rates have been fixed in accord-
principle that the charges for telephone service in one area
e an undue burden on the balance of the company's cus-

ne Los Angeles extended area, the rates of return indicated
o. 17 in the Long Beach and West Los Angeles exchanges
above average and justify rates generally below the com-
sal. In the Santa Monica exchange and the remainder of
area exchanges, the returns were below average but not
our opinion to warrant rate differentials after reflecting
ne other items that make up cost of service. Under the cir-
ne reasonable solution at this time is to provide a uniform
tes for extended service.

rison of the present rates for the two basic grades of ex-
e, namely: four-party residence service and one-party
ce, with the rates proposed by applicant and those author-
er herein, follows:

NDED SERVICE—MONTHLY FLAT RATE—HAND SET STATION

	Four-Party Res. Service			*One-Party Bus. Service*		
	Present	*Proposed*	*Auth.*	*Present*	*Proposed*	*Auth.*
----------	$2.60	$4.00	$3.75	$9.25	$10.50	$10.50
----------	2.75	4.00	3.75	9.25	10.50	10.00
----------	2.75	4.00	3.75	9.25	10.50	10.50
----------	2.60	4.00	3.75	9.25	10.50	10.50
----------	2.75	4.00	3.75	7.50	8.50	10.50
----------	2.75	4.00	3.75	7.50	8.50	10.50
----------	2.75	4.00	3.75	7.50	8.50	10.50
----------	2.60	4.00	3.75	7.50	8.50	10.50

orized business rates are being placed at the level proposed
r higher, in order to maintain a proper balance as between
ades of service.

der, we are authorizing the discontinuance of local service
ned basis in all exchanges within the Los Angeles extended
the Long Beach exchange. Such discontinuance will result
available plant capacity through more efficient utilization
plant and equipment. Furthermore, improvement in serv-
stantial simplification in tariff schedules will result.

ision of extended service to all subscribers in the Los An-

customers is estimated as a net reduction of $434,000 on a
as compared to the total charges if local service were to be
the present basis.

Counsel for the City of Long Beach took exception t
of the company to make extended service effective for all
Long Beach. His position was that in Long Beach only so
stations are now on an extended service basis, that Long B
self-contained city with only 3.9% of its calls being toll call
the large number of stations available the calling rate per
as high as in the smaller communities where only a few tho
are available, and that the geographical and economic con
cause any great demand on the part of the citizens of L
extended service.

We agree with counsel's position on this subject to t
the proposed discontinuance of existing local service in th
exchange will not be authorized at this time.

In connection with the change from local to extended
will be a certain period of time during which it will be nece
tain local service rates in the Santa Monica, West Los An
Downey, Malibu, Redondo, and Whittier exchanges. In the
and West Los Angeles exchanges, applicant stated that th
be made within 30 days after the effective date of this ord
the short interval of time until full extended service will be
the present level of local service rates will be continue
interval. For the remainder of the exchanges, which the c
to convert within 10 months, the local rates will be increase
authorized for the Long Beach exchange.

The company has as an objective of its long-term pl
Angeles extended area exchanges the provision of all busi
a message rate basis. The provision of facilities for busin
line and private branch exchange message rate service s
grammed for installation at the earliest feasible date in o
plish a more equitable distribution of charges in accordan
The possible discontinuance of flat rate business service
consideration when facilities are available to provide messa

A witness for the Cordingly-Sherman Apartment-H
the proposal to substitute hotel message rate private bra
service at 5 cents per message for flat rate service. He c

the hotel is some $200 per month less under the message
n under a flat rate basis, and that the company never gave
e that the rates would not have to be changed in the future.
pinion, the proposal by the company to change hotel and
use private branch exchange service in West Los Angeles
m a flat to a message rate basis is sound. Under present
ng economic conditions, neither a utility nor this Commis-
rantee that rate levels and classifications can remain fixed
ded period of time. In our opinion, the message rate basis
for telephone service is a more equitable way of properly
cost of providing service to the small and large user.
licant has requested authorization to withdraw the offering
gn exchange service and substitute extended rates for the
w filed, where the serving exchange is in the Los Angeles
a. We believe that foreign exchange service, where the
nge is in the Los Angeles extended area, should be fur-
individual line extended service basis. Accordingly, the
exchange schedules will be authorized to be closed to new
d the company will be required to file individual line ex-
ess, residence or private branch exchange trunk service
tes where local service is now furnished. In connection with
iness and private branch exchange trunk service, we are
n that such service should be furnished on a message rate
order will so provide. Applicant has also requested increases
reign exchange mileage rates and the increase requested
rized.

h as the Commission is authorizing increases in rates for
, it follows that affected foreign exchange rates filed by con-
anies should be consistent. Therefore, such connecting com-
l request authority of this Commission to make the neces-
ings to reflect the increases authorized in the serving ex-
e order herein.

is not essential to equalize the return in each and every
have equalized as between the extended area exchanges
nd the outside exchanges as a group. One practical limit
applied in this leveling process is that no existing rates
eased more than 75%, except where the type of service
ng changed. Furthermore, consideration has been given to

service, namely, four-party residence service and one-pa
service, with the rates proposed by applicant and those a
the order herein, follows:

LOCAL SERVICE—MONTHLY FLAT RATE—HAND SET STATI

	Four-party Residential			*One-par*	
Exchange	*Present*	*Proposed*	*Auth.*	*Present*	*Pro*
Long Beach	$2.25	$None	$3.50	$7.50	$1
San Bernardino	2.25	3.75	3.25	6.75	
Pomona	2.00	3.75	3.25	6.25	
Ontario	2.00	3.75	3.00	6.00	
Laguna Beach	2.00	3.75	3.00	5.75	
Huntington Beach	2.00	3.75	2.75	5.25	
Westminster	2.00	3.75	2.75	5.25	
Etiwanda	2.00	3.75	2.50	5.00	
Arrowhead	2.25	3.75	3.75	5.25	
Crestline	2.25	3.75	3.75	5.25	
Lancaster	2.25	3.75	3.75	5.25	
Santa Barbara	2.50	3.75	3.75	7.00	
Oxnard	2.50	3.75	3.75	6.00	
Santa Maria	2.50	3.75	3.75	6.00	
Carpinteria	2.50	3.75	3.25	5.50	
Lompoc	2.50	3.75	3.25	5.50	
Santa Paula	2.50	3.75	3.25	5.50	
Santa Ynez	2.50	3.75	3.25	5.50	
Guadalupe	2.50	3.75	3.00	5.25	
Los Alamos	2.50	3.75	3.00	5.25	
Thousand Oaks	2.50	3.75	3.00	5.25	
Fowler	2.50	3.75	3.25	5.50	
Lindsay	2.50	3.75	3.25	5.50	
Reedley	2.50	3.75	3.25	5.50	

A witness for the applicant testified that it is the cor
eventually to offer, within the base rate areas, only individ
party line business service and that four-party line busine
the average is not a satisfactory grade of service for a bu
prise. In exchanges within the Los Angeles extended ar
has requested that four-party business extended service
only to those subscribers having four-party local service
of the conversion of an exchange to full extended service, a
only until facilities are available to provide a higher grad
service. We think this request is reasonable and that the gra
will tend to provide a more satisfactory service to custor
treatment also will be authorized in the exchanges locate
the Los Angeles extended area where four-party business
is furnished.

The increases proposed in the minimum charge per mo
public toll station service, in telegraph service rates, an

make such a change fully effective. In view of the fundamental of such a change, the increase will not be authorized in wever, new equipment purchased by applicant should be s to permit the placing into effect of a rate other than l messages, should the Commission hereafter find a change ustified.

icant proposes to establish a new exchange, to be designa exchange, which would include all of the present Zuma f the Malibu exchange and a portion of the Oxnard exwn on Exhibit A, Page 9, attached to the application. It hat facilities could be made available to establish such time during 1952. We are of the opinion that the removal district area as a part of the Los Angeles extended area desirable step to be taken at this time. The Zuma district ll rate center so that customers in the Zuma district area es based on their location relative to all other exchanges. ea is sparsely developed at present, it is included in the rea for the Santa Monica and Canoga Park exchanges, t service arrangements should be continued. Accordingly, establish the proposed Zuma exchange is denied.

nission is of the opinion that further consideration should he introduction of extended service in the Carpinteria the view to providing such service on a two-way basis Barbara and Carpinteria. The order will provide for the ubmit a study covering traffic analysis, revenue, expense, cts of introducing such service, and to submit a similar g extended service between the Thousand Oaks, Oxnard, ula exchanges.

ORDER

d Telephone Company, Ltd. having applied to this Com- order authorizing increases in rates, public hearings hav- and the matter having been submitted for decision,

EREBY FOUND AS A FACT that the increases in rates uthorized herein are justified and that present rates, in differ from those herein prescribed, are unjust and unrea- fore,

EREBY ORDERED that

ant is authorized to file in quadruplicate with this Com-

after July 21, 1951.

2. Applicant, within the exchanges herein specified, to cancel rates for local service, other than local for service, on or after July 21, 1951, but not later th 1, 1951 in the Santa Monica and West Los Ang and not later than June 1, 1952 in the Covina, Do Redondo, and Whittier exchanges.

3. Not later than April 1, 1952, applicant shall subm ering traffic analysis and revenue, expense and p introducing extended service, together with appl mendations thereon, between the Carpinteria and exchanges and between the Thousand Oaks, Oxna Paula exchanges. These studies, after being filed mission, shall be open to public inspection.

The effective date of this order shall be twenty (20) date hereof.

Dated at San Francisco, California, this 29th day of

MITTELSTAEDT, HULS, MITCHELL, Commissioners Craeme being necessarily absen ticipate in the dispositi ceeding.

APPENDIX "1"

List of Appearances

Marshall K. Taylor, *Donald C. Power*, and O'Melveny & Meyers, by for applicant; *K. Charles Bean*, *T. M. Chubb*, and *Roger Arne* Los Angeles, interested party; *J. J. Deuel* and *Edson Abel*, for Bureau Federation, interested party; *Dewey L. Strickler*, *J Joseph B. Lamb*, and *Henry E. Jordan*, for City of Long Be *Edward Bochm* and *Frank Mankiewicz*, for Americans for De C.I.O., and Westwood Democratic Club, interested parties; *J* City of San Bernardino, protestant; *David S. Licker*, for Barbara and for Cities of Pomona, Whittier, Redondo Bea Covina, Glendora, Oxnard, Laguna Beach, Santa Paula, Uplan Maria, Guadalupe, and Lompoc, protestants; *Angelo Iacobo Sheehan*, for Lakewood Chamber of Commerce, protestants; *Ma gomery* and *Henry T. Bailey* for City of Santa Barbara, prote *Sorenson* and *J. Leroy Irwin*, for City of Santa Monica, interes *M. Busch*, for Cities of Upland and Ontario, interested pa *Marion A. Smith* and *Robert B. Stillman* for County of San testant; *William Reppy*, for Cities of Oxnard and Port Huen *Donald Benton*, for the County of Ventura, protestant; *Richa* Lompoc Farm Center, protestant; *James C. Westervelt*, for Farm Bureau, protestant; *Wilfred A. Rothschild*, for Thousa of Commerce, protestant; *Arden T. Jensen*, in propia persona,

List of Witnesses

as presented on behalf of applicant by Edwin M. Blakeslee (history, l results of operations), Marshall K. Taylor (number of employees), n (operating characteristics, station data), G. Howard Briggs (esti- ıta), Dean M. Barnes (property for future use, ratio of materials 51 construction program, dial operation data, toll line data), Owen toll, and operator data), Guy T. Ellis (exchange operations, plant, rve, pay roll segregation), Evert E. Karlsson (depreciation, mainte- Frederick C. Rahdert (construction work in progress), Ralph K. history. tax data), Jonathan B. Lovelace (economic and financial rnings).

as submitted on behalf of the protestants and interested parties by Frank A. Mankiewicz, T. M. Chubb, K. Charles Bean, Clarence A. E. Jordan, J. C. Westervelt, W. A. Rothschild, J. R. Henning, A. rman, R. M. Paaske, C. G. Smith, and G. A. Cordingly.

as submitted on behalf of the Commission's staff by Donald C. Neill rnings, general expenses, taxes), Theodore Stein (balance sheet, rve), Marshall J. Kimball (operating revenues, expenses), Greville se), and George W. Smith (service).

EXHIBIT A

Rates

tly effective rates, charges and conditions are changed only as th in this exhibit.

os Angeles Extended Area

EXTENDED SERVICE RATES—EACH PRIMARY STATION

	Residence Flat Rate Service Monthly Rate			*Business Service Monthly Rate*			
				*Msg.Rate**	*Flat Rate*		
	1-Party	*2-Party*	*4-Party*	*1-Party*	*1-Party*	*2-Party*	*4-Party*
------	$5.50	$4.50	$3.75	$--	$10.50	$8.25	$--
.A.---	5.50	4.50	3.75	5.50(80)	--	8.25	8.00
O.A.--	5.50	4.50	3.75	--	10.50	8.25	8.00
------	5.50	4.50	3.75	--	10.50	2.25	8.00
------	5.50	4.50	3.75	--	10.50	8.25	--
------	5.50	4.50	3.75	--	10.50	8.25	8.00
------	7.00	5.55	4.50	--	12.00	9.30	8.75
.R.A.--	5.50	4.50	3.75	5.50(80)	10.50	8.25	8.00
.R.A.--	7.50	5.90	4.75	7.50(80)	12.50	9.65	9.00
------	5.50	4.50	3.75	5.50(80)	10.50	8.25	8.00
------	5.50	4.50	3.75	--	10.50	8.25	8.00

LOCAL SERVICE RATES—EACH PRIMARY STATION

	Residence Flat Rate Service Monthly Rate			*Business Flat Rate Service Monthly Rate*		
	1-Party	*2-Party*	*4-Party*	*1-Party*	*2-Party*	*4-Party*
------	$5.25	$4.25	$3.50	$8.50	$7.00	$--
------	5.25	--	3.50	8.50	7.00	6.75
------	5.25	--	3.50	8.50	7.00	--
------	5.25	--	3.50	8.50	7.00	--
------	5.25	4.25	3.50	8.50	7.00	6.75
------	6.75	5.30	4.25	10.00	8.05	7.50
------	5.25	--	3.50	8.50	7.00	6.75

ea.

MONTHLY RATE—EACH PRIMARY STATION

Exchange	Suburban Line Local Residence	Local Business	Extended Residence	Extended Busin
Covina	$3.75	$6.00	$4.25	$7.2
Downey	--	6.00[a]	--	--
Long Beach	3.75	6.00	7.25	7.2
Malibu	3.75	6.00	7.25	7.2
Redondo[b]	3.75	6.00	7.25	7.2
Santa Monica[c]	3.25	5.00	7.25	7.2
Whittier	3.75	6.00	7.25	7.2

* Applicable to service furnished under Schedule No. A-1(a).
[a] Applicable only to services furnished on a deviation basis.
[b] Suburban area and special rate area.
[c] Furnished only within the Topanga Canyon area.

EXTENDED SEMIPUBLIC COIN BOX SERVICE

Exchange	Ind Minimum Per L
Santa Monica—Special Rate Area	$0.2

Service in Santa Barbara and Ventura County Exchanges

EACH PRIMARY STATION

Group	Residence Flat Rate Service Monthly Rate 1-Party	2-Party *	4-Party	B R M 1 Party
A	$4.50	$3.50	$3.00	$6.25
B	5.00	4.00	3.25	6.75
C	5.50	4.50	3.75	7.50
Special Rate Areas				
Oxnard (Camarillo)	7.50	--	4.75	9.50
Santa Maria (Orcutt)	7.50	--	4.75	9.50

Group	Suburban Line Monthly Rate Residence	Business	P
A	$3.50	$4.50	
B	3.75	4.75	
C	4.25	5.25	

* Not offered in Los Alamos, Santa Ynez and Thousand Oaks.
[a] Applicable only in Thousand Oaks.
[b] Applicable only in Oxnard-Hueneme base rate area.
[c] Also authorized for farmer line service in Gaviota and Las Cruces.

RATE GROUPING

Exchange	Group	Exchange
Carpinteria	B	Santa Barbara
Guadalupe	A	Santa Maria
Lompoc	B	Santa Paula
Los Alamos	A	Santa Ynez
Oxnard	C	Thousand Oaks

EACH PRIMARY STATION

	Residence Flat Rate Service Monthly Rate			Business Flat Rate Service Monthly Rate	
	1-Party	2-Party	4-Party	1-Party	2-Party
', Reedley	$5.00	$4.00	$3.25	$6.75	$5.50
more S. R. A.)	7.00	--	4.25	8.75	6.90

	Suburban Line Monthly Rate		Farmer Line Minimum Charge
	Residence	Business	Per Line Per Month
', Reedley	$3.75	$4.75	$6.75[a]
more S. R. A.)	3.75	4.75	6.75

l Rate Area
n Fowler.

Angeles, Orange and San Bernardino County Exchanges

EACH PRIMARY STATION

	Residence Flat Rate Service Monthly Rate			Business Flat Rate Service Monthly Rate		
	1-Party	2-Party	4 Party	1-Party	2-Party	4-Party
	$4.00 *	--	$2.50 *	$5.50 *	$4.50 *	$4.25 *
	4.25	--	2.75	6.00	4.75	4.50
	5.50	$4.50[a]	3.75	8.50	6.50	6.25
	4.50	3.50[b]	3.00	6.50	5.25	--
	4.75	--	3.25	7.00	5.50	5.25[c]

	Suburban Line Monthly Rate		Farmer Line Minimum Charge
	Residence	Business	Per Line Per Month
	$3.00[d]	$4.25[d]	$8.00[e]
	3.25	4.50	--
	4.00	5.00	8.50[f]
	3.50	4.50	6.50[b]
	3.50	4.75	13.50[c]

y.
y.

—suburban residence, $3.75; suburban business, $5.00.
only.
y

RATE GROUPING

Group		Exchange	Group
	C	Lancaster	C
	C	Ontario	D
	A	Pomona	E
ach	B	San Bernardino	E
	D	Westminster	B
	A		

hanges Outside of the Los Angeles Extended Area

al condition, Schedule No. A-1, Individual and Party Line Service,

and conditions set forth in this schedule for business four-party line

Offered

FLAT RATE SERVICE—BASE RATE AREAS

Each trunk line: 150% of the individual line primary hand rounded to the lower 25-cent multiple except in special rate areas.

FLAT RATE SERVICE—SPECIAL RATE AREAS

Each trunk line: Rate in base rate area plus the difference b for business individual line flat rate service in the base rate area a such service in the special rate area.

MESSAGE RATE SERVICE—DOWNEY, TOPAZ DISTRICT AR

Rate

First two trunks_____
Each additional trunk_____

Schedule No. A-7, Hotel Private Branch Exchange Service Santa Monica, West Los Angeles

EXTENDED SERVICE TRUNK RATE—MESSAGE RATE SERV

Rate

First two trunks_____
Each additional trunk_____

MESSAGE RATE

Each exchange message_____

Cancel rates for hotel private branch exchange flat rate extende in the West Los Angeles exchange.

Schedule No. A-15, Supplemental Equipment All Exchanges Except Gaviota and Las Cruces

SERVICE MONITORING EQUIPMENT

Rearranging or changing connection of service monitoring equipment to subscribers' lines:
One line _____
Two to 10 lines changed at the same time_____
Cancel rates set forth in Rate Section B. Cancel Special Conditi

Schedule No. A-16, Multi-Residence Service—Redondo, Santa Mo

Rates for Multi-Residence Service are authorized to be cancelled

Schedule No. A-18, Vacation Rate Service

Revise Special Condition 5 to read:

No incoming or outgoing service will be furnished during the vac the telephone numbers and facilities will remain available for restorati at the end of the vacation period.

Add special condition to read:

Vacation rate service will not be furnished in connection with f service.

Schedule No. A-19, Foreign Exchange Service All Listed Routes

Primary rates for foreign exchange local and extended service a be made effective at a level consistent with the basic individual line, PBX trunk rates effective in the foreign exchange as of July 21, 19 per month for business service and the first PBX trunk and 25 cent residence service.

Add special condition to read:

The above rates for foreign exchange service comprehend a pr the directories having primary distribution in the local and foreign ex

foreign exchange is outside the Los Angeles extended area.
l condition to read:
nd conditions set forth in this schedule for residence two-party, four-
rban local foreign exchange service beyond the first one-half mile
o services established or applied for prior to July 21, 1951, furnished
criber, either on the same premises or as moved to a different address
scriber within the same local exchange. Additions to the service and
ervice are permitted under this condition.
foreign exchange is within the Los Angeles extended area:
for extended foreign exchange individual line and PBX trunk service
e offering of such service over routes where service is being furnished
der the local foreign exchange tariffs as of July 21, 1951. For business
rates, the basic rates from which the extended foreign exchange rates
ire as follows:

or District Area	*Business Individual Line Message Rate*
----------	$5.50(80)
Torrey District Area----------	5.50(80)
ch ----------	5.50(80)
----------	5.50(80)

number following a rate designates the message allowance under the rate quoted. The
essage over the allowance is 5 cents.

l condition to read:
and conditions set forth in this schedule for local foreign exchange
y to services established or applied for prior to July 21, 1951, furnished
criber, either on the same premises or as moved to a different address
scriber within the same local exchange. Additions to the service and
service are permitted under this condition.

FOREIGN EXCHANGE MILEAGE RATES

mileage rates as set forth on Exhibit E attached to the first amended
e 14, are authorized.
ence two-party foreign exchange mileage rate of $1.75 for each one-
fraction thereof for service over listed routes between contiguous

-24, Receiving Cabinet Service

nges Except Gaviota; Lake Hughes and Las Cruces

rates set forth in Exhibit E, attached to the first amended application,
thorized.

-2, Toll Station Service

rates set forth in Exhibit E, attached to the first amended application,
ıthorized.

-1, Telegraph Service

rates set forth in Exhibit E, attached to the first amended application,
thorized.

H-1, Message Unit Service

rate of 5 cents per message unit in connection with Hotel PBX service
s Angeles exchange is authorized.

---

03 (June 29, 1951). Niels Schultz (Millbrae Highlands Water Com-
thorized to issue a promissory note.

---

09 (June 29, 1951). Acme Transportation, Inc., authorized to execute
ditional sales contracts.

D 45895, A 32407 (June 29, 1951). Southwest Gas Corporation, Ltd issue $400,000, par value, of its First Mortgage Bonds, 4% Serie 1448 shares of common stock.

D 45896, A 32452 (June 29, 1951). Felton Water Company authori 16.3 acres of nonoperative property to the estate of George deceased.

D 45897, A 32402 (June 29, 1951). Amends route 8, subparagraph paragraph 2 of D 45840 Eastern Cities Transit, Inc., and exte order. (1st Supp. Order).

D 45898, C 5308 (June 29, 1951). *Ione West* v. *Pacific Telephone Company*. Interim restoration of service pending hearing.

D 45899, A 32498 (June 29, 1951). Louis M. Goodman (Goodman D and Goodman Delivery Service, Inc., authorized to transfer hi carrier and express operative rights to 20th Century Deliver

D 45900, A 32493 (June 29, 1951). Pine Flat Water Company aut 400 shares of $10 par value common stock.

D 45901, A 32080 (June 29, 1951). Willig Freight Lines allowed time on D 45350, a securities order. (1st Supp. Order).

A 45902, A 32079 (June 29, 1951). E. J. Willig Truck Transport allowed an extension of time on D 45351, a securities order. (1s

D 45903, A 31825 (June 29, 1951). John F. Neher and Mae Neh Telephone Company) allowed an extension of time on D 449 Order).

D 45904, A 32527 (June 29, 1951). Western Pacific Railroad Com to construct tracks at grade across Indiana and Tennessee Str cisco.

D 45905, A 32499 (June 29, 1951). Southern Pacific Company au struct a drill track at grade across LaFayette Street, Santa Cla

D 45906, A 32470 (June 29, 1951). City of Bakersfield authorized t ginia Avenue at grade across a Southern Pacific Company tra

D 45907, A 32464 (June 29, 1951). City of Bakersfield authorized t Street at grade across a Southern Pacific Company track.

D 45908 A 32440 (June 29, 1951). Southern Pacific Company autho its non-agency station at Cuneo, Kings County.

D 45909, C 5297 (June 29, 1951). *John Ferro* v. *San Joaquin* Defendant ordered to substitute one of complainant's parcels of in its service area.

D 45910, A 32457 (June 29, 1951). Pacific Gas and Electric Compa carry out the terms of an electric contract with Superior Con Company, Inc.

D 45911, A 32182 (June 29, 1951). Beninger Transportation Servi an in lieu certificate of public convenience and necessity as a service between East Richmond Heights and Richmond extend

D 45912, A 31161 (June 29, 1951). Pacific Greyhound Lines authori over 35 but less than 40 feet in length between San Francis

tric Power Company authorized to charge United States for power pur-
California and transported by the latter to its Naval Ammunition Depot
iorne, Nevada, the rates prescribed for such service by Decision No.
d authorized and directed to charge Mineral County Power System for
rchased in California and transported by the latter to Nevada for resale,
prescribed for such service by said Decision No. 41798.

UTILITIES—INTERSTATE COMMERCE—COMMISSION—GENERAL JURIS-
ND POWERS. Where the Navy pursuant to contract purchases electric
California from an electric utility, which energy is derived both from
nd non-licensed projects in California and is consumed by the Navy
a Naval reservation in Nevada by the Navy and its naval and civilian
, there is nothing either in the interstate commerce clause of the Fed-
titution or in the Federal Power Act to preclude the jurisdiction of
rnia Commission.

UTILITIES—COMMISSION—JURISDICTIONAL LIMITATIONS—INTERSTATE
E. A state cannot regulate the rates charged by a local electric utility
nt sold to a foreign electric utility for resale in another state and
at the state boundary, inasmuch as the interstate business carried on
he two utilities is essentially national in character, and state regula-
d constitute a direct burden upon interstate commerce, placing a direct
on that which, in the absence of federal regulation, should be free.
U.C. v. *Attleboro Steam and Electric Co.* (1927), 273 U. S. 83, 71
.

UTILITIES—INTERSTATE COMMERCE—COMMISSION—GENERAL JURIS-
ND POWERS. Even if it be assumed that the sales by California Elec-
Navy are in interstate commerce, regulation by the State of California
es for such sales does not fall within the proscription of the *Attleboroe*
Only one state, viz., California, is directly concerned, since no state
jurisdiction over the Navy, an arm of the federal government. Thus,
bsent that potential clash of respective state interests which underlay
usion in the *Attleboro* decision. Perhaps an even more conclusive cir-
e for the proposition that the interstate commerce clause does not
California jurisdiction is the fact that electric rates prescribed by the
a Commission are not the rates which a utility must charge on arm
ited States Government. General Order No. 96 provides that an electric
ay furnish electric service "at free or reduced rates or under condi-
erwise departing from its filed tariff schedules to the United States
s departments." Thus, the federal government is in no way burdened
otiations with an electric utility by a California rate order.

UTILITIES—INTERSTATE COMMERCE—COMMISSION—GENERAL JURIS-
AND POWERS. Congress has conferred jurisdiction on the Federal
ommission under Section 20 of the Federal Power Act only if any of
s directly concerned has not provided a commission or other authority
e the requirements of Section 20 within such state ("requirements"
y referring to the provision that the rates and services by licensees
s purchasing from licensees for resale in public service shall be reason-
d furthermore, even though the requisite state commissions or other
es have been provided, only if the states directly concerned are unable
on the services or rates through their properly constituted authorities.
fornia Commission is the kind of state "commission or other authority"
ated by Section 20, for it has comprehensive power to regulate electric
tes and service "within such state," viz., California. California is the
e which can, because of its authority over California Electric, affect
to the Navy. Since only one state is 'directly concerned," no question
of inability as between two states directly concerned to agree on the

of electric energy to any person for resale."

[6] ELECTRIC UTILITIES—INTERSTATE COMMERCE—COMMISSION—G DICTION AND POWERS. Jurisdiction is denied the Federal Po over sales of electric energy for use by the Navy in Nevada by th of Sections 201(a) and 201(b) of Part II of the Federal Pow 201(a) declares that federal regulation shall "extend only t which are not subject to regulation by the States" and Sectio Part II applicable to "sales at wholesale in interstate comm intended the Federal Power Commission to have jurisdiction o where the United States Supreme Court had declared state regu could not be exercised because of the interstate commerce clau

[7] ELECTRIC UTILITIES—INTERSTATE COMMERCE—COMMISSION—G DICTION AND POWERS. The machinery set up in Section 20 o Federal Power Act, which allows state jurisdiction under cer when applied to sales of electric energy to Mineral County Po resale in Nevada, enables the California Commission to exer without interfering with the rights of Nevada and without imp burden on interstate commerce. Part II does not apply because County Power System are not to a "person" as defined. Even construed to apply, the proviso clauses alluded to in Sections 201 of Part II operate to preserve the exercise of jurisdiction recog

[8] ELECTRIC UTILITIES—INTERSTATE COMMERCE—COMMISSION—G DICTION AND POWERS. In the case of the sales to Mineral Count (1) each of the states directly concerned, viz., California and N vided "a commission or other authority to enforce the requi section [Section 20 of Part I of the Federal Power Act] wit and (2) such states have not, through their properly constitu been shown unable to agree on the rates for the sales in ques under said Section 20, jurisdiction over the sales rests in the mission.

Henry W. Coil, for applicant, California Electric Power Company; and *L. B. B. Lindstrom*, for Mineral County Power System *Hamilton Treadway*, and *F. W. Denniston*, for the United Stat *H. Lakusta*, for the Commission's staff.

OPINION

California Electric Power Company, by its first and s mental applications in this proceeding, seeks determinat the Commission's Decision No. 41798 of July 1, 1948, au tain rate increases, applies, respectively, to sales to the N of the Government's Naval Ammunition Depot, Hawth and to sales to Mineral County Power System for resale in Nevada. Applicant requests that such determinations b affirmative, thus making the utility's Schedule P-2 appl sales to the Navy and its Schedule P-3 applicable to the sal County Power System. Should the Commission construe not to apply, applicant seeks the establishment of appropr such sales.

Both supplemental applications refer to the matter o and the position is taken that jurisdiction lies in the Cal

r rates, are reasonable. A further hearing was scheduled
calendar when the Federal Power Commission evinced,
spondence, a desire to explore the question of jurisdiction.
ation thereof, on February 15, 1950, it issued an order to
gainst California Electric Power Company. On March 20
pursuant to mutual agreement between that Commission
ncurrent hearing was held which, in so far as this Commis-
erned, bore solely upon the jurisdictional question. It was
Commissioner Rowell that, if additional evidence should
visable at a later date, due notice would be given.
be stated at the outset that the Commission is now satis-
areful weighing of the record, that no further evidence is
sfactorily to dispose of the issues raised by the two supple-
eations. Accordingly, the order herein will include sub-

ric Power Company Operations.

a Electric Power Company renders public utility electric
itheastern California in parts of Mono, Inyo, Kern, San
Riverside, and Imperial counties. Its Nevada Division serves
and Esmeralda counties, Nevada. Fifty-five per cent of all
pplied by the company comes from its own generating
other forty-five per cent is obtained from Southern Cali-
Company, the Department of Water and Power of the
ngeles, and neighboring electric production agencies with
nia Electric maintains interconnections.
950, California Electric served an average of about 56,000
per cent of whom were in California. Residential and
omers purchased 11 per cent, rural customers, 15 per cent,
commercial customers, 61 per cent, and other customers,
f California Electric's energy sales.
pany's production sources are interconnected with a net-
voltage lines extending southerly from Mono County to
no about 300 miles along the easterly slope of the Sierra
tains, also extending throughout its main system around
no and Riverside, and easterly from Victorville some 200
er Dam Power Plant. In 1950, the maximum system demand
w.
customers, Mineral County Power System, with a demand

hall the distance being in California and the other half in
ing periods of emergency trouble, these customers have ar
the more reliable Navy line jointly. California Electric adj
to conform to the disposition of deliveries upon advice
tomers. Mineral County Power System resells the energy i
its retail customers in Nevada. The Navy uses its deliv
mented by its own fuel generating plant, for the powe
requirements of its industrial activities and for the re
commercial needs of employees or personnel housed at the
ervation.

Construction of Decision No. 41798.

In Application No. 28791, California Electric soug
increase in rates. It proposed increases in all of its filed ta
in a number of special contract rates. It did not request
increase the rates contained in the then effective special co
cable to sales to the Navy and to Mineral County Power

For the rate proceeding, studies of the trend and p
of applicant's revenues and expenses were made by applic
interested parties, and by engineers of this Commission's
be seen from the exhibits in the proceeding, from the a
of applicant to this Commission, and from the testimony of
Engineer of this Commission, the revenues and expenses
with the sales to the Navy and Mineral County Power
included in the statistics upon which the earning studie
In Decision No. 41798, the Commission concluded that a
entitled to an increase in rates. In prescribing rates, it
spread the increase equitably among the several classes
in accordance with accepted practice. The Commission ind
satisfaction with special rate contracts and directed applic
tinue a substantial number of special rates. It prescribed
and P-3 for customers of the same type and kind as t
Mineral County Power System, respectively. It made tho
plicable to all similar customers on the California system
City of San Bernardino. It further satisfied itself that t
deliveries to the Nevada system was at a level substantiall
to the wholesale power schedule. By establishing such ra
mission was satisfied that each customer would be requir
more than was necessary and that no customer would obt

a contract dated October 5, 1945, which specified a term of
The rates applicable to the Navy were set forth in a contract
the period July 1, 1943, to June 30, 1944, and thereafter
days' written notice by either party.

es prescribed by Decision No. 41798 became effective August
letter dated July 30, 1948, California Electric notified the
termination of the July 1, 1943, contract, to be effective
1948. The contract with Mineral County Power System by
ns expired on October 4, 1948. Since no new contract rates
for either the Navy or Mineral County Power System, the
P-2 and P-3, respectively, became applicable on October 1
5, 1948, respectively, unless Decision No. 41798 should be
ot to apply.

n No. 41798 does apply, as we construe it, to the sales to
d Mineral County Power System. It is true that the decision
er specifically to such sales, but there can be no doubt from
ensive language and general tenor, to say nothing of the
on which it is based, that it was intended to cover all sales
a Electric. The decision states:

s previously noted, a number of applicant's deliveries to large
ers are made under special contract agreements at rates other
ose contained in the filed tariffs. Under the request contained
pplication, the Commission is asked to authorize applicant to
fective certain changes in special contracts. Several of the ex-
ntracts under their present terms and conditions provide for
lication of any newly effective tariffs authorized. The remain-
tracts providing for deliveries at special rates either have ex-
r, within the next twelve months, will expire or may be
ted by applicant. Under these circumstances it appears un-
ry for the Commission to order at this time the termination
nsive modification of any existing special contracts."

n further states:

ariffs herein authorized are intended for application to all
sales by applicant to customers in California, excepting only
les to other distributing agencies with whom applicant has
ange agreements. . . . In any one area a single rate will apply
ervice to domestic customers; . . . a large block power rate
ovide for the major industrial and commercial deliveries;
d a resale power rate will apply to deliveries for resale
es."

d in the decision that the conditions surrounding the utility's

to the Navy and Mineral County Power System, we turn to
of jurisdiction.

Jurisdiction.

The question is presented whether California is pre
jurisdiction over the sales to the Navy and Mineral Co
System, either by virtue of the interstate commerce clause
its own force, or by enactment of the Federal Power Act (
49 Stats. 841, 16 USCA Sec. 791, et seq.). In arriving at th
that jurisdiction is not precluded, we have been substan
by the several briefs filed in connection with the concurr
We are not unmindful that the Federal Power Commission, i
No. 212 issued on April 13, 1951, asserted jurisdicition, C
Smith dissenting. It may be noted that the Federal Exami
pared an opinion stating that the Federal Power Commissi
out jurisdiction. Rehearing was denied on June 6, 1951.

We will consider separately the sales to the two custome

Sales to the Navy.

[1] The service to the Navy was begun, as indicated ab
pursuant to a contract for the sale of all energy required by
ment "for use of the Government's Naval Ammunition I
thorne, Nevada, except such electric energy as may be gene
government on said premises." The energy purchased by
consumed wholly on the Naval reservation which, in add
installations devoted directly to Naval use, includes the
Naval personnel described as "public quarters" and the "
Cost Housing Project" known as Babbitt, which provides liv
and facilities for those civilians connected directly or indire
Navy's activities on the reservation.

The evidence indicates that, while a large percentage o
furnished to the Navy is derived from licensed projects, the
when all or a portion of it comes from non-licensed sources.

As stated above, the energy is delivered by California E
Navy at Mill Creek and transmitted by the Navy over its
Nevada for consumption.

It is our opinion that upon such facts there is nothing
interstate commerce clause of the Federal Constitution or in
Power Act to preclude our jurisdiction.

2] that a state cannot regulate the rates charged by a local
ty for current sold to a foreign electric utility for resale in
e and delivered at the state boundary, inasmuch as the inter-
s carried on between the two utilities is essentially national
and state regulation would constitute a direct burden upon
mmerce, placing a direct restraint on that which, in the
ederal regulation, should be free.

en if it be assumed that the sales by California Electric to
e in interstate commerce, regulation by the State of Cali-
rates for such sales does not fall within the proscription of
o decision. Only one state, viz., California, is directly con-
no state can have jurisdiction over the Navy, an arm of the
rnment. Nevada has no jurisdiction over the rates the Navy
fornia Electric, nor over the rates the Navy charges its per-
tenants. California's jurisdiction arises solely from its
er California Electric. Thus, there is absent that potential
pective state interests which underlay the conclusion in the
cision.

an even more conclusive circumstance for the proposition
rstate commerce clause does not preclude California juris-
e fact that electric rates prescribed by our Commission are
s which a utility must charge an arm of the United States
The Commission in 1942 issued General Order No. 96,
les in Section X-B, that an electric utility may furnish
ce "at free or reduced rates or under conditions otherwise
om its filed tariff schedules to the United States and to its
." (See Public Utilities Act, Section 17.) Thus, while the
etween charges under filed tariffs which have been found
nd the revenue actually received for service supplied to the
rnment, would have to be borne by California Electric rather
omers, the federal government is in no way burdened in its
with the utility by a California rate order.

vs that since a sister state is not deprived of anything to
ntitled and the federal government is in no way burdened,
ise of California jurisdiction, such jurisdiction does not
ndue burden upon interstate commerce and, therefore, does
he interstate commerce clause of the Federal Constitution.
d be noted in passing that the situation here presented is

electricity are in furtherance of its national defense obliga
undertaking to provide electric service to its personnel an
Hawthorne is merely incidental thereto.

Not only do we conclude that the interstate commerc
sents no barrier to the exercise of our jurisdiction over th
Navy, but we find nothing in the Federal Power Act takin
diction away. Such conclusion is reached even if it is a
Part I of the Act (setting forth the provisions applicable
from licensed projects is involved) and Part II (applying "
electric energy at wholesale in interstate commerce but . . .
any other sale") both apply or that either Part I or Part II
Safe Harbor Water Power Corp. v. *FPC* (CCA 3d, 1941), 1
cert. dnd. (1942), 316 U.S. 663, 86 L. ed. 1740; *Safe Harbor*
Corp. v. *FPC* (CA, 3d, 1949), 179 F. 2d 179, cert. dnd. (19
957, 94 L. ed. 1368.

Turning first to Part I (derived from the Federal Wat
(1920, ch. 285, 41 Stat. 1063)), if it be assumed that the
Navy are in interstate commerce, the applicable language
Section 20 providing, in so far as pertinent, that when:

> "said power or any part thereof [presumably any pow
> by a licensee] shall enter into interstate or foreign c
> rates . . . and the services . . . by any . . . license
> any person, corporation, or association purchasing pow
> licensee for sale and distribution or use in public ser
> reasonable . . . to the customer . . .; and whenever
> states directly concerned has not provided a commis
> authority to enforce the requirements of this section
> state . . . or such states are unable to agree through t
> constituted authorities on the services . . . or . . . ra
> isdiction is hereby conferred upon the [Federal] Com
> to regulate . . . so much of the services . . . and .
> therefor as constitute interstate or foreign commerce

[4] It will be observed that Congress has conferred ju
the Federal Power Commission under Section 20 only i
states directly concerned has not provided a commission or
ity to enforce the requirements of Section 20 within such sta
ments" apparently referring to the provision that the rates
by licensees or persons purchasing from licensees for res
service shall be reasonable), and furthermore, even thou
site state commissions or other authorities have been pro

d of state "commission or other authority" contemplated
for it has comprehensive power to regulate electric utility
ice "within such state," viz., California. We have already
n considering the interstate commerce clause, that Cali-
nly state which can, because of its authority over California
t the sales to the Navy. Nevada cannot order the Navy to
rate for electricity purchased, nor can it order the Navy
rtain rate for electricity distributed. It follows that, since
is "directly concerned," no question can arise of inability
o states directly concerned to agree on the reasonableness
harged to the Navy. Thus, Federal Power Commission
excluded because the two conditions to its exercise, as pre-
ngress in Section 20, are absent.

to Part II of the Federal Power Act (enacted as part of
ility Act of 1935, ch. 687, 49 Stat. 803), it is declared in
) that:

e provisions of this Part shall apply . . . to the sale of
nergy at wholesale in interstate commerce, but shall not
ny other sale of electric energy . . ."

this jurisdictional language, it is provided in the policy
Section 201(a) that federal regulation of the "sale of such
gy at wholesale in interstate commerce is necessary in the
, such federal regulation, however, to extend only to those
are not subject to regulation by the states."

side the question whether the sales are in interstate com-
r that **[5]** the sales to Navy do not fall within the language
ic energy at wholesale," which is defined by Section 201(d)
le of electric energy to any person for resale." The sales
re neither sales to a "person" nor are they sales "for

"person" is defined by Section 3(4) of the Act to mean
l or corporation." A "corporation" by Section 3(3):

ny corporation, joint-stock company, partnership, associ-
siness trust, organized group of persons, whether incorpo-
not, or a receiver or receivers, trustee or trustees, of any
egoing. It shall not include 'municipalities' . . ."

hat the Navy is not a "person" as defined.

is the Navy not a "person" but the sales to it cannot prop-
ed as "sales for resale." We have already alluded to the

language. All of the energy is consumed on the Naval res
is used in the Depot's industrial operations or dissipa
losses; the balance is used by the individuals and business
located on the government reservation. Individuals may
duct business only so long as their presence is consistent w
obligations. The lease agreements with those occupying
ters'' and with those occupying the low-cost housing pro
Babbitt, both provide that the rental privilege ceases upo
of employment. For the business concessions, the goverr
''Revocable Permit'' reciting that the concession is ''fo
tion of employees of the Depot.''

It follows that the sales to the Navy are in effect fo
It is true that, in supplying electricity to those living
business at the reservation, the Navy is in a sense ''rese
purchased from California Electric Power Company, h
that the term ''sale for resale'' in Part II of the Feder
was intended to refer to a very different situation. Th
repeatedly pointed out that Part II was enacted to clo
utility regulation revealed by the *Attleboro* decision. Se
tral Power & Light Co. v. *FPC* (1943), 319 U.S. 61, 8
63 S. Ct. 953. The Navy is certainly not a public utility. I
it would not be precluded from that status by virtue of
the federal government, it could not be deemed a public ut
of furnishing electricity to tenants whose continued ter
upon the needs of the Navy landlord.

We are satisfied, in the light of the foregoing obse
the sales to the Navy are not to a ''person for resale''
of the Federal Power Act, but quite aside from that
jurisdiction is denied the Federal Power Commission b
clauses of Sections 201(a) and 201(b) of Part II. Secti
clares that federal regulation shall ''extend only to those
are not subject to regulation by the States'' and Secti
making Part II applicable to ''sales at wholesale in i
merce'', contains the proviso that Part II ''shall not appl
sale of electric energy.'' Taking these sections together a
them in the light of their statutory history, it is plain
intended the Federal Power Commission to have jurisd
that area where the United States Supreme Court had
regulation over sales could not be exercised because of

machinery set up by Congress in Section 20 of Part I to
upon certain conditions to exercise jurisdiction without
terstate commerce is available upon the facts shown and
ible for California to regulate the sales to the Navy. Thus,
he Constitution and Part I of the Federal Power Act,
ay exercise jurisdiction. Therefore, the provisos of Sec-
and 201(b) in Part II operate to deny Federal Power
urisdiction under Part II. It follows that there is nothing
prevent the exercise of California jurisdiction over the
ion, and we so conclude.

l County Power System.

iously noted, California Electric sells electric energy to
ity Power System at Mill Creek, and the latter transmits
er its own line to Nevada, reselling to local consumers in
n the case of the Navy, the evidence indicates that, while
ntage of the energy is derived from licensed projects, there
en all or a portion of it comes from nonlicensed sources.
the propositions set forth above in support of our con-
ve may properly exercise jurisdiction over the sales to the
vith equal force to the sales to Mineral County Power Sys-
r, there are certain differences which will be pointed out
is which follows.
stated that independently of any consideration of federal
interstate commerce clause does not operate to prevent
om exercising jurisdiction over the sales to the Navy inas-
lash between state interests can be involved and inasmuch
l government is not burdened by the exercise of California
A different situation exists with the sales to Mineral County
n, for the State of Nevada clearly has an interest in the
icity to Mineral County Power System and the rates in
by it to its customers. **[7]** Turning to the Federal Power
, we are satisfied that the machinery set up in Section 20
ich allows state jurisdiction under certain conditions, when
e facts in issue enables this Commission to exercise juris-
ut interfering with the rights of Nevada and without im-
due burden on interstate commerce. We are further satis-
t II does not apply because the sales to Mineral County
n are not to a "person" as defined. We are further satis-

ditions must, by the terms of Section 20, be present before
concerned may exercise jurisdiction: (1) they must have
with authority to enforce the requirements of Section 2
state; (2) such states must not be unable to agree upon t
charged. [8] In the case of the sales to Mineral County P
(1) each of the states directly concerned, viz., California
has provided "a commission or other authority to enforc
ments of this section within such state," and (2) such st
through their properly constituted authorities, been sho
agree on the rates for the sales in question.

Considering the first of these propositions, it canno
contended that the California Commission, entrusted as i
broad regulatory authority over the rates and service of u
the state, fails to qualify as "a commission or other autho
the requirements of this section within such state." Whil
Public Service Commission does not exercise as great a deg
over the Mineral County Power System as it does over p
zations engaged in public service in Nevada, it neverthele
jurisdiction over Mineral County Power System's rates. Ne
of 1925 provide at page 55:

> "Sec. 16. The maintenance and operation of said M
> Power System shall be under the control, supervision
> of the board of managers, and rates charged to consu
> and distribution of electric energy and current, and
> telephone service, with the terms and conditions the
> fixed by said board, *subject to the supervision of the*
> *Service Commission, who may revise, raise or lowe*
> (Emphasis added.)

The quotation makes clear that the Nevada Public Servic
is, with respect to Mineral County Power System's rates
sion or other authority to enforce the requirements of this
such state."

The Federal Power Commission, adopting the cont
counsel, has declared in its Opinion No. 212, above referr
order to qualify as "a commission or other authority t
requirements of this section within such state," a commiss
authority not only to regulate the rates charged by a u
rates such utility pays for power purchased outside the st
mitted in interstate commerce. It is claimed that the Ne
sion does not qualify because it is not empowered to fix the

ommissions with powers beyond those normally entrusted
vers which might indeed be found to be unconstitutional.
to the second proposition, there was no evidence whatever
hat California and Nevada "through their properly con-
orities" were "unable to agree." No evidence whatever was
cting any course of dealing, or an absence thereof, between
a and Nevada commissions, or between any other authorities
ctive states. The Chairman of the Nevada Public Service
stated at the concurrent hearing that his Commission had
not to participate in the cooperative procedure and that
pear only as an interested party. He further stated:

tate of Nevada, therefore, is not interested except to the
hat the users are living in Nevada and, therefore, I will say
are very much interested. I am not prepared to state at
e what the position of our Commission would be, until after
tter of jurisdiction has been decided. That is all the state-
wish to make."

make apparent that there was no inability to agree, and
ada Commission has adopted a neutral position.

ws that, since neither of the circumstances prevail upon
ral Power Commission jurisdiction is conditioned under
jurisdiction properly may be exercised by this Commission
es to Mineral County Power System, at least until such
properly constituted authorities of California and Nevada
o agree on the rates to be charged for such sales.

ring next the effect of Part II upon our jurisdiction, we
discussing the sales to the Navy that that Part gives the
er Commission jurisdiction only over sales "to any person
The sales to Mineral County Power System undoubtedly
sale" but they are not sales to a "person." Section 3(4)
erson" as "an individual or corporation." A "corporation"
(3) "shall not include 'municipalities' as herein defined."
ality" by Section 3(7) means "a city, county, irrigation
inage district, or other political subdivision or agency of a
ent under the laws thereof to carry on the business of devel-
nitting, utilizing or distributing power . . ." Mineral County
m, as we understand it, is the operating name for the County
n its proprietary capacity as the seller of electric energy
us, it is a "municipality" as defined in Section 3(7) and

to be regarded to be within the purview of Part II, the pro
of Sections 201(a) and 201(b) apply. Our views heret
respecting them apply with equal force. Since by the p
Part I, Section 20, the California Commission upon the fa
ercise jurisdiction, the proviso clauses in Part II operate to
jurisdiction by denying it to the Federal Power Commission

In the light of the conclusion we have reached respect
struction properly to be placed upon our Decision No. 41798
clusion that we have jurisdiction over the sales both to th
to Mineral County Power System, we herewith order as foll

ORDER

The first and second supplemental applications of Califo
Power Company having been duly considered after hearing a
of briefs, and it appearing that no further hearing is neces
pose of any of the issues presented, and the Commission
it has jurisdiction in the premises,

IT IS HEREBY ORDERED that the matters upon
supplemental applications herein are submitted.

IT IS FURTHER ORDERED that California Electric
pany is hereby authorized to charge and collect from the Unit
electric service furnished at the Mill Creek hydroelectric
plant and transported by the United States to the United S
Ammunition Depot at Hawthorne, Nevada, the rates prescri
service by Decision No. 41798, viz., the rates set forth in S
attached to such decision.

IT IS FURTHER ORDERED that California Ele
Company is hereby authorized and directed to charge and
Mineral County Power System for electric service furni
Mill Creek hydroelectric generating plant and transported
County Power System or the United States into Nevada f
Mineral County Power System, the rates prescribed for s
by Decision No. 41798, viz., the rates set forth in Schedule I
to such decision.

IT IS FURTHER ORDERED that California Ele
Company take all reasonable steps to collect from Mineral Co
System the charges hereinabove referred to from the tim

n increase in rates. One rate in D 45889 amended. (1st Supp. Order).

53 (July 3, 1951). Desert Express granted several extensions of its highway common carrier services including an extension of its s pickup-delivery area.

3 (July 3, 1951). Valley Transit Lines granted an in lieu certificate onvenience and necessity as a passenger stage service providing for ensions and reroutings.

(July 3, 1951). City of Riverside ordered to close two grade cross- he Atchison, Topeka and Santa Fe Company tracks.

98 (July 3, 1951). County of Marin authorized to reopen a grade er Northwestern Pacific Railroad Company tracks previously closed on under D 45800.

DECISION No. 45919, APPLICATION No. 31431
(July 3, 1951)

Service Company granted increase in rates charged for water service ra Costa District.

mas, Matthew, Griffiths, and Greene, by *Robert Minge Brown* for *Phillips and Avakian* by *Spurgeon Avakian* for the Committee to Water Rate Increase; *John A. Nejedly*, City Attorney, for the City Creek; *Carl G. Schwarzer* and *George Leon* for the Idyllwood Im- Association; *J. L. Knapton* for the Crockett Community Council.

OPINION

proceeding initiated by California Water Service Com- n authority to increase the rates charged for water service Costa District. That district includes the portion of Contra along the south shore of the Carquinez Straits and Suisun Oleum and Port Chicago and areas which extend southerly Clayton Valley to Clayton and through the San Ramon ville. The area served aggregates about 39½ square miles ent population of approximately 60,000 people. The initial the proceeding was filed on May 25, 1950. Hearings on n were conducted in Concord on April 26, 27, and May 2, cluded on May 3, 1951, in San Francisco and the matter he close of oral argument.

ent Contra Costa District of California Water Service he outgrowth of a system started in 1887 in the town of supply industrial demands in the area. In 1889 the Mar- vas acquired, and in 1898 the system was incorporated as Water Company. In 1918 the Martinez distribution system e City of Martinez. The Port Chicago System, started in ownsite developer, was taken over in 1911 by Bay Point

1929 it had increased to about $1,358,000, and at the en
about $6,550,000, so that the present operators have ca
installation of about 80% of the plant investment.

Water for the district is obtained from three source
winter and spring runoff, when Sacramento River water is
low saline content, water is pumped from Mallard Slou
Pittsburg, a distance of 7½ miles to the one-billion-gallon M
voir. Additional water is pumped from wells in the Gover
field south of Clyde and the Galindo and Hollar fields n
of Concord. These primary sources are supplemented by
water from the Contra Costa County Water District su
Contra Costa Canal of the U. S. Bureau of Reclamation's C
Project.

Untreated water is delivered to oil refineries and steam
erating plants at Avon and Martinez. For other custom
must be filtered and aerated to eliminate odors and foreig
treated to neutralize and reduce bacteriological impuriti
variations in elevation of the areas in which service is de
sea level to elevation 600, necessitates the subdivision of th
23 pressure zones. To supply water to these pressure zone
come friction losses in the long transmission lines, 31 boo
stations are required. At the end of 1950, applicant opera
million feet of pipe to serve 14,119 customers, and dur
about 4.1 billion gallons of water. Since 1945, the number
has increased 163%, the length of mains 88%, and the vo
delivered 20%.

Applicant contends that the rates which it is presen
charge for water service, and which have remained at lev
28 or more years ago, must now be increased because of h
in the cost of equipment, materials, and services which a
in conducting its operations. Its general manager cited
increases as typical, and estimated the combined effect o
at about 100%.

Item	*Prewar*
Mains, 6-inch steel, installed, per ft.	$1.20 [1]
Mains, 8-inch steel, installed, per ft.	1.47 [1]
Service, metered ¾-inch, installed, ea.	25.30 [1]
Pump, booster, complete installation	4,493.00 [2]
Tank, elevated steel, 500,000-gal. installed	10,994.00 [1]

[1] 1941, [2] 1943, [3] 1950, [4] 1948.

istrict under present and proposed rates:

	1950 Recorded	1950 Adjusted Present Rates Company	1950 Adjusted Present Rates CPUC Staff	1951 Estimated Proposed Rates Company	1951 Estimated Proposed Rates CPUC Staff
e ___	$779,303	$829,904	$827,856	$1,224,834	$1,230,965
es					
____	512,592	530,259	512,883	557,400	578,995
____	71,523	71,044	68,469	226,255	227,447
____	32,056	32,056	70,100 [1]	36,540	77,100 [1]
____	616,171	633,359	651,452	840,195	883,542
____	163,132	196,545	176,404	384,639	347,423
____	5,822,000	6,090,000	5,822,000	6,785,000	6,616,000
____	2.80%	3.2%	3.03%	5.7%	5.25%

3,100 amortization.

lso presented earnings upon depreciated rate bases (un-
e less depreciation reserve) with interest on the depre-
included with the annuity as an operating expense. For
djusted at present water rates, the rate of return by this
% and for 1951 estimated at the proposed rates 5.27%.
above table, it can be seen that applicant's earnings in
sent rates were about 3%, and that the proposed rates
about 5.7% on the rate base estimated by applicant as
1. In that estimate, the increase in revenue from new
nts to about 10%, and the proposed rates would increase
34%. About one half of the increased gross revenues are
reased tax liability under the currently effective federal
of 47%.

estimate of net revenue by the sinking fund method is
n applicant's. The rate base also is somewhat less, about
he indicated return is 5.25%. The major difference be-
ates of expenses is $40,560 in the allowance for depreci-
tization. Applicant's estimate of depreciation expense is
tors developed by Commission staff engineers in a 1937
proceeding, the staff has made a detailed study of the
nce with, and characteristics of, present plant and prop-
stimate of depreciation and amortization expense is based
.

nce in estimated rate bases is primarily due to treatment
ed in earlier years to develop sources of water supply

the present rates in Contra Costa istrict are insufficient
adequate return, and that the increased rates proposed b
not yield more than a reasonable return on the district r

The filing of this petition by applicant prompted a
tomer opposition. A large proportion of applicant's cu
statements urging this Commission to deny applicant
on the basis that rates were already much higher than in c
munities and adjoining service areas. The Board of
Contra Costa County filed its resolution of September 11
Commission, stating that in the opinion of the Board the
not merited, that they would tend to increase the cost of
they should be denied by the Commission.

Although notices of hearing were sent to all int
specific presentation in opposition was made by those pa
listed as appearances. The City of Walnut Creek, through
ney, took an active part in the proceeding by presentation
testimony and by participation in cross-examination. Gen
the City contended that applicant should not be gran
until it improved the quality of water served, increased
its operating practices, and established a system of rat
treat customers with greater equity. In this connection
the lower separate schedule of rates for the Port Chicag
inated, that wholesale rates to the City's own distribu
designed to produce the same level of net return for t
allowed to applicant, and that applicant's proposed a
charge type of rate be adopted.

Home owners in the area were represented by the C
Committee to Defeat the Water Rate Increase. This
sponsored by a number of neighborhood improvement a
cities of Walnut Creek and Concord, the chambers of co
areas, and the Contra Costa Realty Board. It was the co
committee that present rates are extremely high and th
rates are exorbitant, based upon general knowledge of rat
and not upon the costs incurred by applicant to supply
committee surveyed the water bills in Eldorado Park, a
Pleasant Hills area. These subdivisions are solidly buil
currently familiar mass subdivision type of development
lots approximately $\frac{1}{4}$ acre in size with houses in the $10,0
Water is used for the usual household requirements and

than those presently in effect tended to restrict the land-
area and detracted from the value of property in the com-
rates also fostered installation of private wells and the
istricts to distribute raw water for garden usage from the
Canal to residential areas in the vicinity. Because the rates
ring East Bay Municipal Utility District are more favor-
charged by applicant, there is considerable local sentiment
panding the District's service area and substituting its
t of applicant.

o suggested that this application for increases in rates be
t applicant seek to improve its earnings in other districts.
tended that the relatively high level of present Contra
raised, would induce extreme hardships on Contra Costa
that perhaps such hardships would not be created by
ner areas.

of the contentions suggested by the parties to the proceed-
careful consideration, it appears that the continued ability
o meet the expanding demands of its present customers
the needs of the large numbers of new customers who are
area is at least one of the most important single factors
community development. If the rate of that development
ined under present inflated price levels, as it gives every
ing, then the impact of rising prices on utility costs would
e the same recognition as reflected in the price of lots,
work, and other physical elements of the area expansion.
proposes to withdraw and cancel all flat rate service
ently effective fire protection schedules. In the original
t proposed increases in both the quantity rates and mini-
f its present form of meter rate. It also proposed to retain
s in its Port Chicago service area different from that
ne remainder of the Contra Costa District.

of the evidence submitted herein, applicant furnished a
e results of an allocated cost of service study. That study,
enues and expenses of the year 1950 adjusted, indicated
ts, including return on capital, exceeded revenues by 35%.
f water varied considerably by classes of customer and by
Port Chicago system, the customer cost was shown to be
h, to which demand costs of 14.8 cents and supply costs

on load factor of the diversion of garden irrigation requir
supply of raw water from the Contra Costa Canal, applica
alternative service charge form of schedule at the hear
asserted that it had designed the service charge form of sch
the results of the cost analysis in spreading the cost of se
the objective of producing about the same level of reven
derived from the minimum charge form of rate proposed
tion. The record shows that estimated 1951 revenues, w
charge form of rate, would be $9,484 less than the prop
charge form.

The following tabulation indicates typical compara
between the present and proposed rates at a number of
consumptions:

	Monthly Bill				
	Basic ⅝-inch Meter				
	Main System			*Port C*	
Consumption Cubic Feet	*Present Rates*	*Proposed Rates* *Min. Chg.*	*Serv. Chg.*	*Present Rates*	*P* *Min*
0	$1.25	$2.00	$2.10	$1.25	$
100	1.25	2.00	2.38	1.25	
400	1.40	2.00	3.20	1.25	
1,000	3.50	4.94	4.85	2.50	
2,000	7.00	9.84	7.60	4.50	
3,000	10.00	14.74	10.35	6.00	
5,000	16.00	21.94	15.85	9.00	1

From the foregoing tabulation, it is apparent that u
rate practices it is not now possible to implement the C
Creek's proposal to remove the existing rate differential
Chicago customers and all other customers. The use of r
a "readiness to serve" charge, however, does tend to re
ing differentials.

Applicant supplies raw and finished water to a n
industrial customers. At the time the application was
served such customers under special contracts at rates
filed tariff rates. The effective contracts had been auth
Commission. Subsequently, applicant canceled its specia
finished water and has since billed such customers at fi
Applicant intends to apply the proposed rates to such c
authorized. It seeks authority to increase the rates ap
water service under the existing special contracts for su
present rates make a distinction in charge for water o
company from the river and water obtained from the

onnection that the Port Chicago system is entirely sep-
rest of the district and has its own production, storage,
n facilities. The water treatment problems are consid-
An emergency standby interconnection between the two
ntained. Typical bills for representative consumptions
ne following tabulation:

INDUSTRIAL SERVICE
MONTHLY BILLS FOR RAW WATER DELIVERIES

Present Rates		*Proposed Rates*
River Water	*Canal Water*	*All Water*
$4.00	$5.72	$6.22
20.00	28.60	31.10
40.00	57.20	62.20
200.00	286.00	311.00
400.00	572.00	622.00
1,350.00	2,410.00	2,565.00
2,350.00	4,520.00	4,775.00
4,350.00	8,740.00	9,195.00

stimates that the proposed raw water rates would, if appli-
an increase of about $15,600 in 1951, an increase in such
out 17.4%.

circumstances, it appears appropriate to authorize appli-
rate changes, including the alternate schedules of rates
application herein, that is, those in which the service
ut distinctly from the commodity charge. Particularly
litions which prevail in this district, it is believed that
e structure will prove less discriminatory between classes
would the type of rate structure presently in effect and
inally proposed by applicant to be continued in effect.
made an oral request that it be authorized to prorate the
ed during the first billing period after the effective date
s upon the basis of the average daily consumption estab-
irst meter reading subsequent to that effective date in
the necessity of reading all the meters on the effective
cedure appears reasonable and may be followed by the

ORDER

Water Service Company, having applied to this Com-
order authorizing certain increases in rates and charges
Costa District, public hearings having been held, and the
been submitted for a decision,

1. Applicant is authorized to file in quadruplicate v
mission after the effective date of this order, in co
the Commission's General Order No. 96, the sch
shown in Exhibit A attached hereto and, after no
(5) days' notice to the Commission and the pu
said rates effective for service rendered on and a
1951; and concurrently to cancel existing rate sc
seded by the schedules hereinabove authorized.
2. Applicant, within forty (40) days from the effecti
order, shall file with this Commission four (4) se
regulations governing customer relations applicab
Contra Costa District, each set of which shall con
map or sketch drawn to an indicated scale upon a
inches in size, delineating thereupon by distinctive
boundary of applicant's present service area an
thereof with reference to the immediate surroun
provided, however, that such filing shall not be
final or conclusive determination or establishmen
cated area of service, or portion thereof.
3. Applicant, within forty (40) days after the effecti
order, shall file four copies of a comprehensive
an indicated scale of not less than 400 feet to the in
by appropriate markings the various tracts of land
served and the location of various properties of app

IT IS HEREBY FURTHER ORDERED that appli
ized to revise existing contracts with certain industrial
the supply of raw or untreated water, and to incorpora
schedule of charges shown in Exhibit B attached hereto a
notice as may be required by the provisions of each of th
tracts, to make said rates effective for such service rende
but not earlier than on August 1, 1951. Each such revised
be prepared in conformity with Paragraph X-A of the
General Order No. 96 and, within thirty (30) days after
thereof, applicant shall submit two copies of each revise
filing.

The effective date of this order shall be twenty (20)
date hereof.

Dated at San Francisco, California, this 3rd day of

MITTELSTAEDT, CRAEMER, HULS, POTTER, MITCHELL, C

(Exhibits A and B not printed herewith)

IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

NIA ELECTRIC POWER COMPANY,

Petitioner,

vs.

POWER COMMISSION,

Respondent.

---

er's Reply to Respondent's "Memorandum in ponse to Pages 15-17 of Petitioner's Reply ef."

HENRY W. COIL,
DONALD J. CARMAN,
3771 Eighth Street,
Riverside, California,
Attorneys for Petitioner.

IAMMACK,
H M. LEMON,

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No. 12987

IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

NIA ELECTRIC POWER COMPANY,

Petitioner,

vs.

POWER COMMISSION,

Respondent.

---

er's Reply to Respondent's "Memorandum in ponse to Pages 15-17 of Petitioner's Reply f."

---

ndent having filed a Memorandum entitled as urporting to discuss pages 15-17 of Petitioner's rief, the Court, in response to Petitioner's state- at Respondent had misrepresented Petitioner's lowed Petitioner ten days to file this reply.

rgument at pages 15-17 of Petitioner's Reply headed

The 'Indistinguishable' 25%."

The matter at pages 15-17 of Petitioner's Re
is a subsidiary argument or a "but if" argume
do contend on the main case that the energy del
Navy is not in interstate commerce and is not f
within the meaning of the statute, but at this p
place we dropped down to a subsidiary positio
in effect: But if the energy is in interstate c
and, if some part (say 25%) is resold, FPC h
diction over only the part resold.

The actual statement (Rep. Br. p. 15) was:

> *"It must be admitted that the remaining*
> *least, is not subject to FPC jurisdiction."*

Respondent's Memorandum does not accord
statement, but says (p. 1):

> "Petitioner argues that *federal regulatio*
> *yield to State regulation of its sale to Navy*
> *only 25 per cent of the energy sold to Navy*
> (emphasis added),

and that (p. 2):

> "* * * because the admittedly jurisdict
> ergy flow is mixed with a larger flow o
> which, standing alone, would not be subject
> mission jurisdiction, the *entire sale* is ou
> Commission's jurisdiction." (Emphasis ad

Petitioner made no such statement; its Reply
succinct and clear to the effect that the 75%

emorandum seeks to make Petitioner say that
t would be subject to FPC jurisdiction.

he Respondent, not the Petitioner, which uses
ingling" argument. Petitioner does not admit
e is any "comingling" which affects this case at
akes any of the energy "indistinguishable." This
resort of Respondent. Its claim is that FPC has
on over energy not sold for resale, because and
use of "inextricable comingling."

ecord disputes the "inextricable comingling"

dent's own Exhibit 32 computes the percentages
s sales of total purchased and generated energy
s:

'1943 (last half)	28.6%
1944	19.7%
1945	15.5%
1946	15.8%
1947	20.3%
1948	22.5%"

g 6 [R. p. 105] recites in part:
For the period from 1943 to 1948, inclusive, the
entage of energy resold by the Navy (to the
purchased from California Electric and gen-
ed by the Navy) ranged from 15.4% to 28.6%,
average being 18.7%."

both these quantities are given in Exhibit 32,
centages of energy purchased from Petitioner
"resold" can equally well be computed.

Thus, in 1948, there was	Purchased	5,355,1
	Generated	353,7
	Total	5,708,8
	"Resold"	1,281,6
	% "Resold"	

The 5,355,155 kwh purchased is 93.8% of
of 5,708,850 kwh generated and purchased so
22.5% of the total becomes 21.1% of the en
chased, which was "resold."

Respondent's theory of "inextricable mixture"
on the idea that particles of energy or kilow
cannot be distinguished or identified, so that,
tities of energy from different sources get into
line, they can never be separated. The practice
ing two supplies of energy into a line and mete
out of the line is too well known to permit
quibbling.

Such metering and separation was contem
Idaho Power Co. v. FPC, 189 F. 2d 665, wh
itself, issued a license for a transmission line
the Company to receive and transmit over the l
with the Company's own energy, energy suppli
government. The same thing was actually bein
City of Los Angeles v. The Nevada-Californi
Corp., 2 FPC 104, 32 P. U. R. N. S. 193,
FPC suggested no "inextricable comingling" h

ıtities of power from the Bureau of Reclama-
asta Dam and returning, not the same kilowatt
equivalent amounts to the Bureau at numerous
the Central Valley. To adopt Respondent's
uld push back electrical practice in this country
30 years.

ses cited in Respondent's Memorandum present
t situation from the case at bar. In each of
s, the utility company had, *on its system, mixed
antly varying supplies of intrastate and inter-
gy which were delivered to various customers,
s places, at various times, and in varying
No effort was made by the utility to ascertain
of each kind was delivered, from time to time,
eral customers.*

tant case is just the reverse. Petitioner's supply
is all purely California intrastate energy. It
vered for the operation of the Naval Ammuni-
t. It retains those characters until it reaches
tion on the Depot Reservation, where (we are
for argument) an accurately metered portion
' by the Navy.

se is therefore precisely like *Colorado Interstate*
185 F. 2d 357 (C. A. 3). There FPC ordered
Interstate to file a schedule covering *all* of its
to the customers. Here FPC has ordered the
to file a schedule covering *all* its deliveries to
There the Third Circuit held that FPC could

"inextricable intermixture" of particles of ga
the Court can have none with electric energy.

Respondent, at page 3 of its Memorandum
distinguish *Colorado Interstate Gas Co.* by q
language in which the Third Circuit refused to
whether the boiler gas was *in fact* sold for co
or for resale. But, in the present case, we are
for the sake of argument, that some of the elect
is resold by the Navy. Therefore, *Colorado*
Gas Co. is directly in point on the principle that
would be obligated by law to file with FPC only
applicable to resale energy.

The language quoted in the Memorandum f
rado Interstate Gas Co. is, however, authorit
proposition that this Court need not now dete
question of resale or no resale. That depends
past events and can be determined only for
This Court has no way of finding whether
be resale or no resale in the future. It has n
knowing whether or not the Navy will continue
energy to its employees or to make a charge th
even that it will have any tenants to supply.

On the other hand, as suggested by a question
Bench during oral argument, the Navy might
general public service in Mineral County; it
tend its lines into the town of Hawthorne
within the Naval Reservation) in competition
eral County Power System, in which event, it c
ably drive the latter out of business by rea
ability to quote lower rates, that is, 1½¢ per kw

estion of whether or not Petitioner must file a
pplicable to resale energy is a matter of law;
on of whether in the future there is any resale
red by the schedule is a matter of indeterminable
nts. If the schedule were filed covering energy
esale it would cover any energy so resold; if
e resold, the schedule would have nothing on
operate.

to avoid any possible misunderstanding, we
epeat that the Point in Petitioner's Reply Brief
o in Respondent's said Memorandum and also
a subsidiary point, contingent upon the rejection
ner's main point, to which it still adheres, that
no jurisdiction and can be given no jurisdiction
y some further Act of Congress) over Naval
so as to supersede the power of the Navy
nt to negotiate its own contracts for electric
We know of no authority of the Navy Depart-
or without the concurrence of the Attorney
accomplish that transfer of jurisdiction.

Respectfully submitted,

HENRY W. COIL,
DONALD J. CARMAN,
Attorneys for Petitioner.

MMACK,
M. LEMON,
ounsel.

IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

IA ELECTRIC POWER COMPANY, a corporation,
Petitioner,

vs.

POWER COMMISSION,
Respondent,

and

OF MINERAL, STATE OF NEVADA and UNITED
OF AMERICA,
Intervenors.

---

of California Electric Power Company for
earing and Application for Stay of Judgment
ding Certiorari.

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Attorneys for Petitioner.

AMMACK,
M. LEMON,

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No. 12987.

IN THE

d States Court of Appeals

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OF MINERAL, STATE OF NEVADA and UNITED OF AMERICA,

Intervenors.

TION OF CALIFORNIA ELECTRIC VER COMPANY FOR REHEARING.

---

norable the Judges of the United States Court peals for the Ninth Circuit:

ia Electric Power Company respectfully peti- Honorable Court for a rehearing in the above- use with respect to Point IV of Petitioner's Brief. In support of this petition, Petitioner re- shows as follows:

ober 14, 1952, judgment of this Court in the

in said Petitioner's Opening Brief. It is respectf
that this Court may have inadvertently overlo
Point IV. Without waiving any objections
raised to the Order of the Federal Power Co
and reserving to itself the right to urge all s
tions in possible review proceedings before the
Court of the United States, Petitioner requests
eration of this point only.

Under Point IV of said Brief Petitioner u
even if its sales of electric energy to Navy an
County be subject to jurisdiction of the Fede
Commission, the challenged Order is unlawf
Order directs Petitioner to cease and desist fr
ing Mineral County Power System any rates
those in filed Rate Schedule FPC No. 15 (whi
by its terms on October 5, 1948) until and u
expired schedule is duly superseded by a pro
ported new filing or by a rate prescribed by the
sion, and directs Petitioner to file as a rate
the specific rates and charges set forth in its A
dated July 1, 1943, with the Navy (which Agre
cancelled in accordance with its terms October
such schedule to be effective until and unless
superseded by a properly supported new filing
rate prescribed by the Commission.

The facts are that the contract with the Nav
into July 1, 1943, was to run for a period of
and thereafter until 60 days notice of termi
either party to the other. Petitioner, by a 60-d
notice, terminated said contract as of Octobe
The Federal Power Commission did not fix or

did not file or require Petitioner to file said
s a rate schedule under its Rules, nor did Peti-
r do so. Assuming the Federal Power Com-
oes have jurisdiction over the rate to the Navy,
roper order for it to make would be one in the
, either to file rates or to cease and desist from
e. If rates were then filed which appeared un-
nreasonable, the Commission could have pro-
ler Section 205(e) of the Federal Power Act to
ne rates and enter upon a hearing. To order
of specific rates contained in a contract entered
43, since which time the purchasing power of
s revenue dollar has shrunk 50%, without first
Petitioner a hearing as to the reasonableness
tes was unlawful and an improper discharge of
nsibility of the Commission, and if the Order
to stand Petitioner will be deprived of its
vithout due process of law.

er and its predecessors have served Mineral
ower System for many years under a series
contracts, the last being one entered into Octo-
45, providing that, for the term of three years
date. Petitioner would furnish and Mineral
ould purchase all of the electric energy required
unty for resale and distribution in the State
a, at rates set forth in the contract. Said con-
filed with the Federal Power Commission as
edule FPC No. 15." On October 5, 1948, said
xpired in accordance with its terms and ceased
as an effective and operative rate schedule.
r. Mineral County Power System was served in

fornia. Assuming that the Federal Power Co
has jurisdiction over the rates charged Minera
Power System it could properly have ordered
to file the rates it intended to charge, or ceas
sist from service. But to order Petitioner to
desist from charging Mineral County any ra
than those contained in a contract designed f
years, which had expired by its terms and cease
as a rate schedule, without first affording Pe
hearing as to the reasonableness of said rates,
lawful and if the Order is allowed to stand
will be deprived of its property without due p
law.

Wherefore, it is prayed that a rehearing of
be granted and that on such rehearing the Court
the Order of the Federal Power Commission.

Respectfully submitted,

HENRY W. COIL,
DONALD J. CARMAN,
Attorneys for Pe

HAROLD M. HAMMACK,
KENNETH M. LEMON,
Of Counsel.

Certificate of Counsel.

I do hereby certify that I have read and know
tents of the foregoing petition and certify that
tion is filed in good faith and not for purposes

DONALD J. CAR

No. 12987.

IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

IA ELECTRIC POWER COMPANY, a corporation,

Petitioner,

vs.

POWER COMMISSION,

Respondent,

and

OF MINERAL, STATE OF NEVADA and UNITED OF AMERICA,

Intervenors.

ICATION FOR STAY OF JUDGMENT PENDING CERTIORARI.

---

onorable the Judges of the United States Court ppeals for the Ninth Circuit:

nt of the Court in the above matter was en- October 14, 1952, affirming an order of the ower Commission. Petitioner has applied to this a rehearing of said matter. Should said re- e denied, or should said judgment be affirmed ing, Petitioner respectfully requests this Court

to obtain a writ of certiorari from the Supre
of the United States, and, as grounds therefor s

1. That the preservation of the *status qu*
case pending final decision of the Supreme C
entail no possible injury to the United States, N
partment, Ammunition Depot, Hawthorne,
(Navy) or to Mineral County Power System fo
sons:

(a) That Navy is now paying and at all t
paid rates only as set forth in Navy's prior and
contract and as required by said Order of th
Power Commission to be reinstated, Navy hav
Petitioner a "letter of intent" binding Navy to
higher rates claimed by Petitioner as may be f
termined to be lawful; and

(b) That, while Mineral County Power Sy
paid Petitioner rates higher than those named
pired contract, which said Order of the Feder
Commission requires to be reinstated, Petitio
pursuant to Stay Order of this court filed A
1951, established a segregated reserve for th
beginning October 5, 1948, of the difference be
amounts actually chargd by Petitioner and th
would have been charged under said expired
Accruals to said reserve must continue to be m
ing final disposition of the review proceeding
Court or the further order of this court. Disp

such accruals to said reserve pending review
upreme Court and is ready, willing and able to
uch further assurance thereof as to this Court
ı necessary or proper.

at the enforcement of said Order of the Federal
ommission which Petitioner believes to be invalid,
inal determination by the Supreme Court of the
on of the Federal Power Commission to enter
er, would be unfair and inequitable and would
'etitioner of its property without due process of
take property of Petitioner without just com-
contrary to Amendment V to the Constitution
nited States, for the following reasons:

iat, if Petitioner, pursuant to said Order, should
ublish the schedule of rates required thereby,
say, the rates named in said expired contracts,
s would probably become the lawful rates pend-
v in the Supreme Court, even though said order
deral Power Commission were finally set aside.

iat the difference between the rates claimed by
to be lawful and the lower rates which would
ırsuant to said order of the Federal Power Com-
ıs to Navy, is approximately $2,100 per month
Mineral County Power System, approximately
r month; hence, pending review by the Supreme
etitioner would be deprived of approximately
r month even though said Order of the Federal

named in a prior and expired contract with
County Power System, but also requires Peti
repay to Mineral County Power System the
between said two rates back to October 5, 1948,
ing to not less than $120,000; and that, if said
the Federal Power Commission were complied
thereafter held invalid by the Supreme Court, I
would have no remedy to recover from Minera
Power System the money thus uncollected fo
pending review in the Supreme Court or mone
for past service, for the reason that Mineral
Power System has no income or funds, excep
as collected from its customers and remaining
payment of its expenses, and funds set apart fo
purposes such as depreciation or replacement
erty, and has no power of taxation or assessmen
funds to pay obligations in excess of income, a
would be no way to require Mineral County Powe
to charge rates sufficient to pay Petitioner's cla
hold in reserve money rebated by Petitioner or
reserves to pay for future service at the higher r

(d) That the Federal Power Commission
jurisdiction whatever over Navy or Mineral Coun
System and, in the event its said Order were
the Federal Power Commission could not ord
of them to pay Petitioner any money whatever
reason or purpose at all.

t if Petitioner fails to make application for a
rtiorari within the period allotted therefor, or
tain an order granting its application, or fails
ts plea good in the Supreme Court, it shall
r all damages and costs which the Respondent
enors may sustain by reason of the Stay.

ore, Petitioner prays that this court issue an
ing the execution and enforcement of its judg-
red October 14, 1952, in the above entitled mat-
reasonable time to enable Petitioner to obtain
certiorari from the Supreme Court of the
ates.

his 27th day of October, 1952.

HENRY W. COIL,
DONALD J. CARMAN,
Attorneys for Petitioner.

AMMACK,
M. LEMON,
ounsel for Petitioner.

United States
Court of Appeals
For the Ninth Circuit.

'AL LABOR RELATIONS BOARD,

Petitioner,

vs.

T S. GUERIN, RAYBURN B. GUERIN ED. R. GUERIN, Individually and as Co-ners, Doing Business as R. B. GUERIN & IPANY, General Contractors,

Respondents.

Transcript of Record

---

etition for Enforcement of Order of the National Labor Relations Board

No. 12974

United States
Court of Appeals
For the Ninth Circuit.

AL LABOR RELATIONS BOARD,

Petitioner,

vs.

T S. GUERIN, RAYBURN B. GUERIN
ED. R. GUERIN, Individually and as Co-
ners, Doing Business as R. B. GUERIN &
PANY, General Contractors,

Respondents.

Transcript of Record

---

tition for Enforcement of Order of the National Labor Relations Board

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Note: When deemed likely to be of an important nature, btful matters appearing in the original certified record terally in italic; and, likewise, cancelled matter appear- iginal certified record is printed and cancelled herein When possible, an omission from the text is indicated by alic the two words between which the omission seems

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Witnesses, General Counsel's:

Guerin, Ed R.
—direct .....
—cross .....
—redirect .....

Spicher, Dick W.
—direct .....
—cross .....

Witnesses, Respondents':

Guerin, Ed R.
—direct .....
—cross .....

Martin, Lloyd E.
—direct .....
—cross .....

Statement of Points Relied Upon by Peti

Stipulation for Correction of Record....

AND ADDRESSES OF ATTORNEYS

tioner National Labor Relations Board:

ORMAN SOMERS,
Assistant General Counsel, National Labor
Relations Board,
Washington, D. C.;

RY BAMFORD, ESQ.,
Pacific Building,
San Francisco, Calif.

ondents Robert S. Guerin, et al.:

N G. EVANS, ESQ.,
Hobart Building,
San Francisco, Calif.

LRB-501 Budget Bureau No. 64-R00 1.1
48) Approval Expires Nov. 30, 1949

United States of America
National Labor Relations Board

HARGE AGAINST EMPLOYER

Important—Read Carefully

a charge is filed by a labor organization, dividual or group acting on its behalf, a t based upon such charge will not be issued e charging party and any national or inter- abor organization of which it is an affiliate uent unit have complied with Section 9 (f), (h) of the National Labor Relations Act. tions: File an original and 4 copies of this ith the NLRB Regional Director for the which the alleged unfair labor practice or is occurring.

: 20-CA-274.
d: 7/25/49.

ce Status Checked by:

yer Against Whom Charge Is Brought:
ne of Employer: R. B. Guerin and Com- any.
ress of Establishment: P. O. Box 201, outh San Francisco; East Grand Ave. & arbor Way, San Francisco, California.

The above-named employer has engage
is engaging in unfair labor practices w
meaning of Section 8(a), Subsections (1)
three of the National Labor Relations
these unfair labor practices are unfair la
tices affecting commerce within the me
the Act.

2. Basis of the Charge:

Dick W. Spicher was employed
named company on July 7, 1949,
chanic, at a salary of $2.22½ per h
basis of 9-hour day, 6-day week, and
charged on Friday, July 8, 1949,
foreman and master mechanic, for t
that he was not a union member.

It was not known whether or not t
named company operated under a u
contract; however, although Mr.
work was deemed satisfactory he
charged maliciously, without regard
named sections, by the above-named
at their operations near Alturas, Cal

3. Full Name of Labor Organization,
Local Name and Number, or Pers
Charge:

Dick W. Spicher (individual).

4. Address:

1503 Austin St., Klamath Falls, O

ame of National or International Labor
nization of Which It Is an Affiliate or
tituent Unit:

s of National or International, if Any:

tion:

Declare That I Have Read the Above
ge and That the Statements Therein Are
to the Best of My Knowledge and Belief.

y /s/ E. S. HAWKINS,
Attorney in Fact,
2748 Wiard St.,
Klamath Falls, Oregon.

of representative or person filing
.)
25-49.
f any):

False Statements on This Charge Can
ed by Fine and Imprisonment (U. S.
e 18, Section 80).

ed in evidence as General Counsel's Ex-
-A.]

July 18, 1950.

Form NLRB-501 Budget Bureau No.
(12-48) Approval Expires N

United States of America
National Labor Relations Boar

FIRST AMENDED CHARGE AG
EMPLOYER

Important—Read Carefully

Where a charge is filed by a labor or
or an individual or group acting on it
complaint based upon such charge will n
unless the charging party and any nation
national labor organization of which it is
or constituent unit have complied with S
(g), and (h) of the National Labor Rel

Instructions—File an original and 4 co
charge with the NLRB regional direct
region in which the alleged unfair lab
occurred or is occurring.

Case No. 20-CA-274.
Date Filed: 1/5/50.

Compliance Status Checked by:

1. Employer Against Whom Charge Is
Name of Employer: Robert S. Gu
burn B. Guerin, Ed. R .Guerin, d
Guerin & Co., General Contracto
Address of Establishment: P. O.

ber of Workers Employed: Not known.
re of Employer's Business: General Con-
ctor.

ve-named employer has engaged in and
g in unfair labor practices within the
f Section 8 (a), subsections (1) and (3)
ional Labor Relations Act, and these un-
practices are unfair labor practices affect-
rce within the meaning of the act.

f the Charge:
W. Spicher, an individual, was employed
e above-named Company at its operations
Alturas, California, on July 7, 1949, as
chanic at a salary of $2.22½ per hour on
asis of a 9 hour day for 6 days a week.
or about July 8, 1949, the above-named
pany, acting through its shop foreman and
er mechanic, and by its officers, agents
epresentatives, discharged D. W. Spicher,
dividual, because he did not have a clear-
from Operating Engineers' Local Union
.

the above acts and by other acts and
uct, the above-named Company, acting
gh its shop foreman and master me-
c, and its other officers, agents and rep-
tatives, has interfered with, restrained
coerced its employees and is interfering
restraining and coercing its employees

3. Full Name of Labor Organization,
Local Name and Number, or Per
Charge:
Dick W. Spicher (individual.)

4. Address:
1503 Austin Street, Klamath Fal
Telephone No.: 8216.

5. Full Name of National or Internati
Organization of Which It Is an
Constituent Unit:

6. Address of National or International,

7. Declaration:
I declare that I have read the ab
and that the statements therein are
best of my knowledge and belief.

By /s/ E. S. HAWKINS,
Attorney in Fact,
20748 Wiard S
Klamath Falls,

(Signature of representative or per
charge.)
Date: January 6, 1950.

Wilfully False Statements on This C
Be Punished by Fine and Imprisonme
Code, Title 18, Section 80.)

[Admitted in evidence as General Cou

United States of America
e the National Labor Relations Board
Twentieth Region

Case No. 20-CA-274

e Matter of:

' S. GUERIN, RAYBURN B. GUERIN,
. GUERIN, Individually and as Co-part-
d/b/a R. B. GUERIN & COMPANY,
ERAL CONTRACTORS,

and

. SPICHER, an Individual.

COMPLAINT

ng been charged by E. S. Hawkins, attor-
t for Dick W. Spicher, an individual, that
Guerin, Rayburn B. Guerin, and Ed R.
dividually and as co-partners, d/b/a R. B.
Company, General Contractors, have en-
and are now engaging in certain unfair
ctices affecting commerce as set forth in
nal Labor Relations Act, 29 U.S.C.A., 141
Supp. 1947), herein called the Act, the
Counsel of the National Labor Relations
behalf of the National Labor Relations
rein called the Board, by the Regional
for the Twentieth Region, designated by
d's Rules and Regulations, Series 5, as

I.

Robert S. Guerin, Rayburn B. Gueri
R. Guerin, hereinafter individually and
ferred to as Respondent, are co-partn
business under the trade name and style
Guerin & Company, General Contractors,
principal office and place of business in S
Francisco, California, and with a branch
Cedarville, California. Respondent is e
the business of general contracting and co
work.

II.

At all times material herein the c
the business described in paragraph I, a
spondent caused and continues to cause s
amount of equipment, materials, and su
be purchased, delivered and transported
state commerce from and through the s
territories of the United States other than
of California to its offices located in the
California.

III.

Operating Engineers Local Union No.
International Union of Operating Enginee
called the Union, is a labor organization
meaning of Section 2(5) of the Act.

IV.

On or about July 7, 1949, Dick W. Sp
employed by Respondent to work as a me

V.

about July 8, 1949, Respondent, by its gents and representatives, and particularly ster mechanic, discharged Dick W. Spicher mploy because he did not have a clearance Union.

VI.

acts set forth in paragraph V, above, nt did discriminate and is now discrimi- regard to the hire and tenure of employ- terms and conditions of employment of W. Spicher and did thereby encourage ereby encouraging membership in labor ions, and did thereby engage in and is ngaging in unfair labor practices within ing of Section 8 (a) (3) of the Act.

VII.

acts set forth in paragraphs V and VI, espondent did interfere, restrain and d is interfering with, restraining and its employees in the exercise of the rights d them by Section 7 of the Act, and did ngage in and is thereby engaging in unfair ctices within the meaning of Section 8 (a) e Act.

VIII.

ts of Respondent as set forth in para- , VI, and VII, above, occurring in con- ith the operations of Respondent described

commerce among the several states, and te
to labor disputes, burdening and obstruc
merce and the free flow of commerce.

IX.

The aforesaid acts of Respondent, as
in paragraphs V, VI and VII, above,
unfair labor practices within the meanin
tion 8 (a) (1) and (3) and Section 2 (6)
of the Act.

Wherefore, the General Counsel of the
Labor Relations Board, on behalf of the
this 20th day of April, 1950, issues his
against Robert S. Guerin, Rayburn B. G
R. Guerin, individually and as co-partne
R. B. Guerin & Company, General Contra
Respondent named herein.

[Seal] /s/ GERALD A. BROWN,
Regional Director, N
Labor Relations B

[Admitted in evidence as General Cou
hibit No. 1-E.]

Board and Cause.]

NSWER OF RESPONDENTS

ow Robert S. Guerin, Rayburn B. Guerin,
uerin, individually and as co-partners
B. Guerin & Company, General Contrac-
answering the complaint herein on file,
y, and allege as follows, to wit:

I.

he allegations contained in paragraphs I
said complaint.

II.

ng paragraph III of said complaint, re-
allege that they are without sufficient
n or belief to enable them to answer the
set forth therein, and basing their an-
such ground deny generally and specifi-
and every, all and singular the allegations
ntained.

III.

ch and every, all and singular, generally
ically the allegations set forth in para-
V, VI, VII, VIII and IX of said com-

and for a Second, Separate and Distinct
the complaint herein said respondents
ollows, to wit:

tions as R. B. Guerin & Company engage
state commerce as defined and set fo
National Labor Relations Act, 29 U.S
et seq., and that by reason thereof this
no jurisdiction over said respondents in
with the matters alleged in the compla
on file.

And as and for a Third, Separate an
Defense to the complaint herein said r
allege as follows, to wit:

I.

That said complaint is defective and s
is without jurisdiction to proceed in said
reason of the fact that there has been a n
of necessary parties, to wit, the Associate
Contractors of America, a corporation
members thereof, and the Operating
Local Union No. 3 of the International
Operating Engineers and the members th

Wherefore, respondents pray the judg
decision of this Board that said complai
respondents be dismissed.

/s/ JOHN G. EVANS,
Attorney for Respo

State of California,
City and County of San Francisco—ss.

Ed R. Guerin, being first duly sworn, d

led matter; that he has read the fore-
ver and knows the contents thereof, and
me is true of his own knowledge, except
matters which are therein stated upon
n or belief, and as to those matters he
to be true.

/s/ ED R. GUERIN.

ed and sworn to before me this 17th day
50.

/s/ CATHERINE E. KEITH,
blic in and for the City and County of
rancisco, State of California.

mission Expires December 16, 1950.

ed in evidence as Respondent's Exhibit

July 18, 1950.

[Title of Board and Cause.]

STIPULATION FOR CORRECT
OF RECORD

It is hereby stipulated by and between
mentioned Company, Respondent herein,
Bamford, Counsel for the General Counse
transcript in the above-entitled case be co
follows:

Wherever occurring on pages 147,
name "Archie Ball" be changed t
bald."

Dated at San Francisco, California, th
of August, 1950.

ROBERT S. GUERIN, RAYMOND B.
ED R. GUERIN, Individually ar
partners, d/b/a R. B. GUERIN & C

By /s/ JOHN G. EVANS,
Counsel for the Re

/s/ HARRY BAMFORD,
Counsel for the Ge
Counsel.

Dated at San Francisco, California, th
of August, 1950.

Received August 8, 1950.

Board and Cause.]

INTERMEDIATE REPORT

Statement of the Case

a first amended charge filed January 6, Dick W. Spicher, through E. S. Hawkins, n-fact, the General Counsel of the Na- bor Relations Board, herein called respec- General Counsel and the Board, by the Director for the Twentieth Region (San , California), issued a complaint dated 1950, against Robert S. Guerin, Rayburn n, and Ed R. Guerin, individually and as rs, doing business at R. B. Guerin and herein called the Respondents, alleging bondents had engaged in and were en- certain unfair labor practices affecting within the meaning of Section 8 (a) (1) of the National Labor Relations Act, as 61 Stat. 136, herein called the Act. Copies nplaint, first amended charge, and notice g thereon were duly served upon Respond- the charging party.

espect to the unfair labor practices, the alleged in substance that Respondents business of general contracting and con- work in the State of California, and in ct of that business have caused the trans- in interstate commerce of substantial

charged Dick W. Spicher from their e
their construction operations near Altu
fornia, because he did not have a clear
Operating Engineers Local Union No. 3
ternational Union of Operating Enginee
called the Union.

Respondents filed an answer on July
admitting the nature of their business a
and the employment of Dick W. Spicher
1949, as a mechanic on their operations a
California, but denying the commission c
fair labor practices. It denied that Re
were engaged in interstate commerce and
Board had jurisdiction. It also alleged
was without jurisdiction to proceed in th
cause of nonjoinder of necessary parties,
Associated General Contractors of Ameri
called the AGC, and the Union.

Pursuant to notice, a hearing was held
18 and 19, 1950, at San Francisco, Calif
fore the undersigned Trial Examiner, d
nated by the Chief Trial Examiner. Th
Counsel and Respondents were represented
sel, and the charging party appeared in p
parties participated in the hearing, and
forded full opportunity to be heard, to exa
cross-examine witnesses, and to introduce
bearing on the issues.

At the outset of the hearing, Genera
moved for judgment by default on the

e Respondents moved for permission to
nal answer. The record shows that a copy
nplaint, first amended charge, and notice
g were properly served by registered mail
ndents at their main office in South San
, California, on April 21, 1950. Respond-
ed no excuse for failure to file an answer
me, other than the statement of their
Ir. Evans, that there had been some ques-
about a week before the hearing whether
nsel for the Associated General Contrac-
merica would represent Respondents in
Although it appears that Respondents
quent in consulting counsel for purposes
the answer, the record also shows that
e pre-trial conferences between General
nd Mr. Evans, representing Respondents,
k before the hearing opened, for the pur-
ipulating certain facts in preparation for
ng. At the opening of the hearing, Re-
were represented by Mr. Evans and two
artners, Ed R. Guerin and Robert S.
Under these circumstances, the Trial Ex-
nied the motion of General Counsel for
by default and permitted Respondents to
nswer.

the course of and at the close of General
case, Respondents moved to dismiss the
upon the grounds that they were not

diction by the Board would not effectuat
cies of the Act; and that the AGC and
should have been joined as necessary part
motions were denied, with leave to ren
close of the hearing. They were renew
spondents at the close of the hearing on th
previously stated, and the Trial Examine
decision. The motions are now disposed
findings and conclusions in this Report.
ents also moved to strike all evidence a
General Counsel relating to the AGC, it
ship, the nature and volume of business o
bers, and the contractual relations betw
and the Union; decision on that motion
wise reserved; it is now denied for reason
hereafter.

All parties presented oral argument
Trial Examiner at the close of the he
have not availed themselves of the op
afforded them to file briefs and propose
of fact and conclusions of law.

Upon the entire record in the case, and
observation of the witnesses, I make the

Findings of Fact

1. The Business of the Respondei

During the year 1949 and at the time of
ing, Respondents Robert S. Guerin, Ra
Guerin, and Ed R. Guerin were engag

rin & Company, with their principal office
South San Francisco, California, and a
fice in Cedarville, Modoc County, Cali-
uring the period from June 1, 1949, to
950, Respondents engaged in construction
rime contractor or subcontractor on five
on operations within the State of Cali-
he contract prices of these projects ag-
approximately $745,762.37. Four of the
involved filling, excavating, grading, and
nt of ground in preparation for building
on in San Francisco and South San Fran-
lfornia, and totaled approximately $62,-
ese contracts had been completed prior to
g.

h project, known as the "Modoc job,"
ime contract with the California State
nt of Public Works for the clearing, fill-
ng, and drainage of 8.1 miles of California
hway No. 28 between Tom's Creek and
in Modoc County, California,[1] at a con-
of approximately $683,522.57. This oper-
ch constituted by far the major portion
dents' business in the above fiscal period,
n progress at the time of the hearing. It
project involved in this proceeding.
erformance of the above contracts during

oroximate location and size of the project
ed by the portion of Highway No. 28

the fiscal period stated, Respondents r
purchases totaling approximately $629,28
figure included $359,488.19 for the direc
of materials and equipment, including
ment, reinforcing steel, corrugated pip
gas, oil, Diesel fuel, and related it
sources entirely within California, and
for rental of trucks, Caterpillar tra
other heavy equipment. Respondents' o
purchases were approximately $18,765
amounted to about 3 per cent of their
chases or about 5 per cent of the total m
equipment purchases. Respondents pr
rented equipment from dealers within
approximately half of it was rented w
to purchase which were never exercised.
equipment comprised between 20 and
valued at about $300,000; 6 of these were
rented and were valued between $100,000
000; most of the new items were Caterpill
which, though rented from dealers in
had been almost wholly manufactured and
in the State of Illinois.

California State Highway No. 28, invo
"Modoc job," is a standard two-lane p
way which runs from Redding, Shast
northeastward to and across Modoc Co
in California, and thence to the Nevada
where it connects with Nevada State Hi

hway No. 28 continues as a segment of
way No. 395 for about 10 miles, and then
ff eastward and continues to the Nevada
U. S. Highway No. 395 is a main traffic
ıecting lower Oregon, northern California
stern portion of Nevada. U. S. Highway
averses the northern part of California
oastline to Alturas where it joins U. S.
No. 395. The portion of California State
No. 28 between U. S. Highway No. 395
evada line appears to be the main traffic
ıecting Modoc County and the northeast
California with the adjoining northwest
Nevada.[2]

ıly 8, 1949, Respondents, as a partner-
been a member of the Northern Califor-
er of Associated General Contractors of
AGC), a corporate organization of ap-
y 280 persons, firms, and corporations
the highway and heavy engineering con-
usiness in the northern part of Califor-
nain purpose of the organization is the
nt of conditions under which its members
ıd one of its main functions is the nego-
execution of labor agreements on behalf
nbers with various labor organizations.

ve findings are based on uncontradicted
ed testimony of Ed R. Guerin, a sum-
espondents' transactions prepared by him

The members of the Northern Califor
of AGC during 1949 performed about
of all heavy engineering and highway
in northern California, doing a gross
that area in excess of 150 million dolla
12 of its members[3] performed constru
during 1949 outside the State of Cali
Board has previously taken jurisdictio
these members[4] in proceedings under th

The AGC has negotiated and execute
of its members master collective bargai
ments with the Union dated May 27, 19
1948, and July 15, 1949, which covered w
and other working conditions of all em
cluding heavy-duty mechanics, perfor
within the recognized jurisdiction of
These agreements were binding upon the
AGC during the periods of their oper
agreement of May 28, 1948, was effecti
date and remained in effect until Apri
the agreement dated July 15, 1949, becam

---

[3]Guy F. Atkinson Company, Bechtel C
Bates & Rogers Construction Corporatio
Corporation, Peter Kiewit Sons' Compa
Inc.; A. Teichert & Sons, Inc.; Utah C
Company, J. R. Reeves, Brown-Ely Com
west Piping & Supply Co., Inc., and Fost
Corporation.

---

[4]Guy F. Atkinson Co., 90 NLRB
NLRB 88; J. R. Reeves and A. Teiche

and remained in operation until April 30,
ne terms and effect of these agreements
onsidered further in the discussion of the
of Dick W. Spicher.

above facts Respondents argue that (1)
l is without jurisdiction because they are
ed in interstate commerce; and (2), if en-
such commerce, their operations have so
effect on that commerce that the assertion
iction by the Board would not effectuate
es of the Act. I do not agree with this
n. Respondents' out-of-State purchases of
000, their rental of equipment valued at
,000, which had its origin in another State,
act that during 1949 and 1950 over 90 per
neir business consisted of the reconstruc-
substantial part of a main traffic artery
g California and Nevada which also com-
ubstantial portion of a network of U. S.
linking California with Oregon and
all indicate that Respondents' operations

ove findings as to the AGC are based on
icted and credited testimony of Winfield
the 1950 membership roster of the North-
ornia chapter of AGC (General Counsel's
o. 5), and the AGC-Union collective bar-
greements of May 28, 1948, and July 15,
neral Counsel's Exhibits Nos. 3 and 4).
abor agreements were also signed by offi-
he Central California chapter of AGC,
comprised of persons, firms, and corpora-

in that period, particularly on the "Mo
had a substantial connection with inters
merce. It is clear that a labor dispute an
stoppage of work on the reconstruction
Highway No. 28 would have deprived pe
firms travelling in interstate commerce
northern California and Nevada of the u
main artery of traffic between those Stat
point. The Board has recently taken ju
over other general contractors engaged
road construction who did less business
less out-of-State purchases than Respon
the Matter of Brown-Ely Co., 87 NLRB
the Matter of J. R. Reeves and A. Teicher
Inc., 89 NLRB No. 1. In those cases the
were involved, among other work, in the
tion of U. S. highways. Although Respond
not working directly on a U. S. highwa
Federal Government, I see no less reaso
assertion of jurisdiction here, since over 9
of Respondents' operations involved a S
way which is not only a segment of a n
U. S. highways, but also the main artery
state traffic connecting that network in
California with the State of Nevada.

General Counsel offered the evidence
ganization and functions of the Northern
chapter of AGC, its contractual relations
Union and Respondents' membership
solely on the question of jurisdiction, to

tions between the members of AGC and
, and a consequent impact upon interstate
. General Counsel disclaimed any inten-
ow by this proof a common labor policy
nd the Union as motivating the discharge
here. Respondents therefore argue that
nce is immaterial and should not be con-
the question of jurisdiction alone, that
ly be considered by the Board for that
f offered to show a common labor policy
rties and AGC, in which event AGC and
are necessary parties to this proceeding.
heory, Respondents moved to strike the
in question and also to dismiss the pro-
for nonjoinder of AGC and the Union.
on based on nonjoinder of parties will be
l in the discussion of the merits hereafter.
r the evidence in question relevant and
or the following reasons: The operations
mbers of the Northern California chapter
outlined above, both within and without
of California, clearly have a substantial
n interstate commerce. Furthermore, al-
espondents' membership in AGC became
July 8, 1949, the very day of the alleged
charge of Spicher, it appears from the
icted testimony of Respondent Ed R.
at Respondents' predecessor firm, Guerin
in which he had also been a partner, was
of AGC for many years past during

agreements between AGC and the Uni
facts indicate a continuing identity of in
tween Respondents and their predecessor
AGC, in their relations to the Union, w
dates the events of July, 1949, alleged in
plaint. Finally, in the bargaining perio
April 30, 1949, the termination date of
master agreement between AGC and the U
July 15, 1949, the effective date of the
tract, a labor dispute between a membe
and the Union might impede the progr
negotiations and consummation of the ne
contract, which would have a direct effe
over-all labor relations of the AGC and its
and could lead to a labor dispute caus
spread interruption of the operations of
bers.

Respondents' argument also involves
sequitur. I know of no rule of evidence
istrative procedure which requires Genera
to offer this proof on the main issue of
of the discharge, to support a theory no
by him, before the Board can consider
on the preliminary issue of jurisdiction.
words, before offering this evidence to sh
labor difficulty of one member of AGC m
wide impact on the broad relations of its
with the Union, General Counsel is not
first to offer the evidence to prove, in rev
the over-all AGC Union relationship, and

nd material on one point has been re-
an be considered by the Board if relevant
ial on any other aspect of the case. In
ction, the significance of the contracts
GC and the Union, and Respondents'
ion of them, will be considered below in
the discharge of Spicher. Respondents'
strike the above evidence is therefore

basis of all the foregoing facts and con-
, I find, contrary to Respondents' con-
hat Respondents are and have been
interstate commerce, and that the asser-
risdiction over their operations would
the policies of the Act.[6]

The Labor Organization Involved

g Engineers Local Union No. 3, of the
nal Union of Operating Engineers, is a
nization within the meaning of Section
e Act, which admits to membership em-
Respondents.

II. The Unfair Labor Practice

le issue in the case is whether Respond-
rged Dick W. Spicher from their employ
1949, because he did not have a clearance
Union.
. Spicher, a resident of Klamath Falls,

Oregon, came to work for Respondent
"Modoc job" on July 6, 1949, as a h
mechanic. That work involves the major
and repair of heavy transportation and
tion equipment such as Caterpillar tract
dozers, excavating shovels, and trucks o
types. Overhaul and repair of such equi
quires the disassembly and assembly, wit
ment of parts, of transmissions, rear end
final drives, and other components.

Spicher came down to the Modoc job
quest of one Murien, of Murien and Cox
tractors of a portion of the clearing wo
project. This firm was using two Caterp
tors for the clearing work, and in th
thereof, Murien had asked Respondents
one of the tractors overhauled by their r
Murien became dissatisfied with the wor
mechanic, whereupon Ed R. Guerin told h
a mechanic is satisfactory to him, arrangi
the man chosen by Murien and charge M
Cox for his labor and the cost of parts and
used in the overhaul. Murien then
Spicher through a mutual acquaintance a
him to come to work on the job, advising
ents' field office of his choice. An office
of Respondents called Spicher on July
advising him to come to Cedarville at on
they needed him, and also advising that
ents had already cleared him with the

ld office at Cedarville on the afternoon th, Murien met him and took him into the , where an employee of Respondents had some paper for Respondents' records. id not work that afternoon, but reported the next morning, July 7, at the shop, was assigned by Lloyd Martin, master of Respondents, to go out on the project ul equipment. He went out on the job ools and worked on Murien's tractor and ipment that day.

Spicher reported for work July 8, 1949, ld him to come back to work on the eve- , starting at 3:30 p.m. When he returned ternoon to start that shift, he met one , business agent of the Union, outside nts' shop and office, and had a discussion At the outset of the conversation, Martin, a member of the Union, was inside the y a few feet away. Archibald asked f he had his union book and clearance Union. Spicher replied that he did not book with him, and that he had been ith the Union through Respondents' office. moment Martin came up to them, and asked Martin if he had seen Spicher's When Martin said he had not, Archibald Spicher he could do nothing for him, had men at the union office waiting for

said "Yes," and as he and Archibald wa
together, Martin told Spicher, "I guess
you, then." Spicher did not work that
was paid off for his work on July 7, 194
left the job.[7]

Spicher has not worked for Respond
July 8, 1949. Respondents made him a
tional offer of reinstatement on Septembe

Respondents claim that Spicher was
mistake, that he was not a qualified
mechanic, and that he left the job of his
on July 8, 1949, either because he disc
could not do the work, or because of
pulsion from the Union. In support of
of a mistaken hiring, Ed R. Guerin tes
he and Murien found Spicher working
Murien's tractors (apparently on Jul
Murien indicated he had never seen Spic

---

[7]The findings of the above events ar
sation are based upon the credible tes
Spicher. Archibald did not testify in th
do not credit the denial of Martin that
any of the conversation or that he
Spicher: he admitted that he was close
the conversation, and that he had bee
Archibald earlier that day that he was
Spicher, a nonunion man, on the job; h
of testifying and attitude on the stand w
and not straightforward; much of his
was vague and equivocal, and some of it s
dictory; and in general his testimony w
in candor and other indicia of veracity. I

d Spicher "where the other man was," to
picher replied that the other man got his
ack and sent Spicher in his place. I reject
mony because I have already found, on the
Spicher's credible testimony, that he had
Murien about the job beforehand, and that
net him when he first arrived at the project
to it that he was signed up by Respondents.
ling is supported by the significant fact
rin, in his version of the meeting between
and Murien, did not indicate that either
rien objected to Spicher's continuance on
nor that Murien, who was a "pretty fussy
out the overhaul and care of his tractors,
ed or criticized Spicher's work. Murien
alled by Respondents to testify. It is clear
the evidence on this point, and I find, that
was not a stranger to Murien on July 6,
t Murien brought Spicher down to the job,
there was no mistake about his employ-

port of the claim that Spicher was not a
mechanic, Martin, the union master me-
stified that he checked on Spicher's work
lly during the day that he was on the job,
ded that Spicher was not a capable me-
consider Martin's testimony on this point
thy of any credit. Although he claimed to
30 years of experience in work on heavy
t he could not recall a single detail about

in vague statements, such as that Spiche
doing the work in a "workmanlike mann
his "methods were wrong," and the like.
uted his inability to recall details of Spich
ations on July 7th to the fact that "it ha
long"; yet he was able to recall and quote
conversation with Archibald, the agent of
about Spicher which occurred the very
July 8th. Moreover, although Spicher ap
him to be incapable of doing the work, Ma
talked to him about his ineptitude, nor
steps to correct his "wrong" methods
grudgingly admitted, on the other ha
Spicher did some parts of his work "f
that he appeared qualified to do some
the work of heavy-duty mechanic. Respon
rely on Spicher's admitted errors in desc
tails of the type of tractors which he o
for them, but I consider this of no signi
the face of Spicher's own credible testim
his experience of over 16 years as a h
mechanic in which time he had worked on
of heavy construction and transportati
ment; his failure to remember details of
lar type of tractor on which he had not w
some time does not detract from the gene
bility of his testimony. On the basis
evidence on this point, I am satisfied, and
find, that Spicher was qualified to do

ntention that Spicher left the job because
compulsion by the union agent, Archibald,
irectly on Spicher, is not supported by the
id is completely refuted by the substantial
of Spicher, corroborated by the admis-
Guerin and Martin, which have been dis-
ove.

idents claim that Spicher's testimony as
rcumstances of his discharge is inherently
e, and that at most it proves only that he
ff the job after a talk with the union agent.
already resolved the issue of credibility
indings made above. However, if I had
ot about whether Respondents discharged
and the reason therefor, it is set at rest
n admissions of Respondent Ed R. Guerin
master mechanic, Lloyd Martin, which not
port Spicher's testimony, but also clearly
that he was discharged by Respondents in
ce with a discriminatory hiring policy pur-
them on the Modoc job.

Guerin was called as an adverse witness
General Counsel. At first he repeatedly
iat Respondents did not know or care
their employees on the Modoc job did or
belong to the Union, and that it was not
icy to hire only persons approved by the
When confronted with a letter he sent to
d stating Respondents' version of the dis-
however, he admitted that their policy on

union men on the job, Respondents would
a man who was not cleared by the Unio
after Spicher's discharge and when the
Office of the Board wrote Respondents
dated July 25, 1949, requesting Respond
sion of the discharge, Guerin had Res
bookkeeper on the job investigate the circu
and prepare a reply to the Board under
July 28, 1949, which Guerin signed and se
letter states, in pertinent part:

> To the contrary, Mr. Spicher was
> charged upon the authority or insti
> our master mechanic nor by any partn
> company but was informed personall
> business representative of Local No.
> ating Engineers of Redding that he
> work on this or any other project
> was reinstated and became a member
> standing. We were likewise told by th
> sentative that we could not keep this
> the job in violation of our contrac
> agreed by the Associated General Co
> of America, Incorporated, of which
> member. This Association represents
> tractors and negotiates all contracts
> Labor Unions entailing all types o
> Furthermore, it is our understanding
> must employ union members in good
> or those willing to become affiliated

ted by General Counsel to explain the last
l sentence quoted above, Guerin testified:
It was up to the Union delegate to sign
up and give them permits to ask them
in the Union, which happened in many
up there. It is happening right now up

Well, was it your policy if the Union
ed to clear a new employee that you would
refuse to hire him or keep him on your
ll?
It was agreed when we went on the job
they would clear anyone that was com-
t enough to handle a job up there. I am
g about carpenters or 'catskinners or
l crews or grease monkeys or mechanics—
f the crafts that we had to have to accom-
the job.
Well, on your part was it your agree-
that you would employ only those who
cleared by the Union?
Yes. What else could we do, if they
pull their regular members off? We had
ndred and fifty, two hundred people up

Was this policy made known throughout
peration to your supervisors?
Absolutely.

was questioned further about the prepara-

The Witness: Well, I think there sort of a citation came in and it was up and he said, "I think I have go generally briefed out" and he wrot just glanced through it and signed believe I'd do it again. I don't see wrong with it. We are under contrac have a penalty for completion and else and Number one is to have good plenty of help and no beefs with Unions or anybody else.

* * *

Q. (By Mr. Bamford): Wasn't i arrangement between you and the Engineers that if you hired a new through the Union but on your own man would join the Operating Eng

A. Yes, ultimately. They were death to do that.

Trial Examiner Frey: Did you as or order them to join under your and training practices?

The Witness: No, we didn't car they joined or not, but what are you do, Mr. Examiner, when just for th one individual probably a hundred walk off the job. That makes it ple you know. You can't swim upstrea business, but we wouldn't individuall

of a case where a man had an oppor-
to go in the Union—I have never heard
y case where they weren't willing to go
that would relieve us of any further beef

* * *

(By Mr. Bamford): Wasn't it the un-
nding up there in that Cedarville job,
huerin, that all the heavy duty mechanics
o belong to the Operating Engineers or
et cleared by them?

Get cleared, I will go for that, yes.

ne was asked by the Trial Examiner to
s statement "you can't swim upstream in
ess," he testified as follows:

al Examiner Frey: What did you mean
at statement?

Witness: I meant this: in other words,
ieve it came about through asking me
ons about how long I had been in the
ess, in the contracting business, and I said
in before the Union got really heavy,
believe in the last World War they came
y much to prominence, and naturally all
r jobs—we would like to have them go
peacefully and finish them on time, and
s why I meant we couldn't swim up-
n. We had to go along with the trend.

al Examiner Frey: You mean you had

Trial Examiner Frey: Does that r
that you were afraid that if one indiv
kept on the job the Union would
action against you?

The Witness: Well, that is possib

Trial Examiner Frey: Well, is
you mean by that statement there?

The Witness: Yes, I will say that
meant, yes.

* * *

Q. (By Mr. Bamford): I am as
your policy was; not how many mem
were up there. Wasn't it your polic
that everybody, all of your heavy
chanics and your operators too, I su
to be organized with Local 3?

A. Well, sure.

Q. And that policy was made kno
supervisor, is that correct?

A. Certainly. They were all Unio

Q. And your master mechanic, Llo
was a supervisor? A. That is

Trial Examiner Frey: Was he
man?

The Witness: Yes.

It is clear from the record that Marti
power to hire and discharge employees.

When Guerin testified for Respondents
that when he signed the letter of July 2

ending the letter he discussed it with his
and regarding that discussion he testified:

(By Mr. Bamford): In your conversa-
with Mr. Evans, did you discuss the matter
hether or not there was a contract between
rating Engineers Local 3 and the AGC?

Well, I assumed that he would know that.
ther words, we had been getting help and
anics and operators out of that local ever
it was formed, and I don't believe that
phase of it I mentioned to him.

And by "getting help and operators"
f the local, you mean that there was a con-
, you thought that there was a contract?

Yes.

Not only at the time that the letter was
en but at the time that Spicher was termi-
l from your company, is that correct?

Oh, yes. In fact, I have sat in on the
, some of the beefs between the union and
contractors. Of course, this is a new firm
we started, this R. B. Guerin and Company,
tly, but I was a member of the firm of
in Brothers and we were a charter member
e AGC for many years, and we would sit
ith the different unions on working out
ing conditions, wage scales, and I presumed
we were within a contract at that time.

And the contract provided that you had
ploy union members in good standing or

A. I understood, with the contra
man had ninety days to join the uni
think that is the policy that we fol
there. I believe I have read the Wag
Act, and at that time I don't think I
a copy of the Taft-Hartley Act.

It is clear from the record that there wa
ing collective bargaining contract in exis
tween AGC and the Union on July 8, 19
Spicher was discharged. The master agr
May 28, 1948, between AGC and the Un
which Guerin was undoubtedly familiar,
in Section 3 thereof:

In the hiring of employees covere
agreement, preference shall be give
Employer and the individual employe
hereby to persons who have been em
Northern California between May 1,
May 31, 1948, on any work covered by
Master Agreement dated May 29, 194
individual employer covered by this A

Whenever any individual employ
men, he shall post a written notice o
bulletin board and shall notify the Un
same time, which notice shall be give
forty-eight (48) hours before the
needed on the job, whenever possible.
purposes of this paragraph it shall be
that such notice be given to the Unio

rea in which the job is located. Upon such
e being given, the Union agrees that it will
ish an adequate supply of competent em-
ees if they are available.

e Collective Bargaining Representatives
e that, if and when a union security clause
awfully be written into this agreement, they
then promptly enter into negotiations con-
ng hiring and union security clauses. If
when hiring and/or union security clauses
written into this agreement pursuant to
negotiations, then this section shall forth-
become inoperative.

of the master agreement effective July
between the same parties contained an
provision, with the exception of an addi-
ference to the previous agreement of May
10 It does not appear from the record that
these agreements had been authorized un-
proviso to Section 8 (a) (3) of the Act.
since neither of them were in effect at the
Spicher's discharge, the exact effect and
of the hiring provisions quoted above are
al in this proceeding. The agreements
s are relevant and material only to the
at Respondents' interpretation of their
ovisions indicated the hiring policy that
nts followed in the hiring and subsequent
of Spicher. Guerin's testimony quoted

contracts was in effect on July 8, 1949,
under his interpretation of it Respondent
quired to hire only heavy-duty mechanics
cleared by the Union and, as a corollary,
could not retain in their employ any such
not cleared by the Union, under pain o
stoppage or strike.

The testimony of Martin also indicates
policy was in effect when Spicher was hire
admitted that an agent of the Union v
project regularly once a month to clear
union workmen whom Respondents had
that all Respondents' employees on the
union men when hired, or signed up with
within 90 days. I do not credit his or Gu
timony as to the 90-day clearance, ho
neither of the contracts upon which Re
relied contained such a provision; and i
applied in the case of Spicher, the only
cleared by the Union. I likewise reject
testimony that the Union had agreed to
nonunion men hired by Respondents on t
job because help was scarce: the facts fo
indicate that this procedure was not fo
Spicher's case; and while Martin intim
the Union refused Spicher a clearance b
was not a qualified mechanic, that excuse
cause Respondents expressly disclaim
discharged Spicher because he was ineffi
there is no proof in the record that the u

areful consideration of all the pertinent in the record, I am convinced that the rance of credible evidence shows, and on thereof I conclude and find, that Dick W. vas discharged by Respondents on July 8, ause he was not cleared for work on the oject by the Union, and that by such dis- espondents discriminated against Spicher to his hire or tenure of employment and or conditions of his employment, in order age membership in the Union, and thereby ection 8 (a) (3) of the Act. By such dis- n against Spicher, Respondents also inter- , restrained, and coerced their employees rcise of rights guaranteed to them by Sec- the Act, in violation of Section 8 (a) (1) t.

The Nonjoinder of Parties

answer and at the hearing Respondents at the complaint be dismissed for non- AGC and the Union as necessary parties, ory that introduction of testimony by the ounsel as to labor relations between AGC nion indicated that General Counsel was g to prove the discharge of Spicher was of a common labor policy of AGC and its (including Respondents) with the Union, at basis both AGC and the Union should charged with violation of the Act and

July 28, 1949, to the Board, that the Unio
Respondents, was responsible for the disc

These arguments misconceive the basis c
plaint. The only charges before the Boa
record are against the Respondents, and o
thereof the complaint only charges Re
with a violation of the Act. The complain
allege, and General Counsel did not claim
to prove, that the discharge was the res
application of a common labor policy by
its members. Nor does the complaint char
tion of 8 (b) of the Act.

Under the Act the Board is empower
unfair labor practices and to issue a reme
only against parties named in the comp
where no charge is filed and no compla
against another party, it is without powe
an order against such other party.[11] The
this case does not disclose whether charges
filed or complaints issued against parties
Respondents. Under these circumstances,
Examiner has no power to require Gener
to change the theory of his complaint
additional cause of action which would r
presence of AGC and the Union, either
Respondents of their liability for the disc
found above, or to make others share tha
On this state of the pleadings and the r
remarks of the Board in Carpenter and S
and General Contracting Employers Asso

. 78, relied upon by Respondents, are not in this case. The motion of Respondents the complaint for nonjoinder of parties is denied.

ıe Effect of the Unfair Labor Practices Upon Commerce

vities of Respondents set forth in Section , occurring in connection with the oper- the Respondents described in Section I, ve a close, intimate, and substantial rela- rade, traffic, and commerce among the ates, and tend to lead to labor disputes and obstructing commerce and the free mmerce.

V. The Remedy

found that Respondents have engaged in ıfair labor practices within the meaning s 8 (a) (1) and 8 (a) (3) of the Act, I will d that Respondents cease and desist there- take certain affirmative action in order te the purposes and policies of the Act.

found that Respondents discriminatorily l Dick W. Spicher on July 8, 1949, because o secure a clearance from the Union. Since ıts made an unconditional offer of rein- to Spicher on September 21, 1949, I will mended that any further offer be made. I will recommend that Respondents make

of pay be computed on the basis of eac
calendar quarter or portion thereof d
period from Respondents' discriminatory
September 21, 1949, the date of Respond
of reinstatement; the quarterly periods, h
called "quarters," shall begin with the fi
January, April, July, and October. Lo
shall be determined by deducting from a
to that which Spicher would normally ha
for each quarter or portion thereof, his
ings,[12] if any, in other employment du
period. Earnings in one particular qua
have no effect upon the back-pay liabilit
other quarter. It is also recommended
spondents be ordered to make available to
upon request pay roll and other records to
the checking of the amount of back pay d

Although it has been found that Respon
criminatorily discharged only one employe
tion of Section 8 (a) (1) and (3) of the
no other violations have been alleged, p

---

[12]By "net earnings" is meant earning
penses, such as for transportation, room, a
incurred by an employee in connection wi
ing work and working elsewhere than for
ents, which would not have been incurre
his unlawful discharge and the consequent
of his seeking employment elsewhere. Se
Lumber Company, 8 NLRB 440. Monie
for work performed upon Federal, Stat
municipal, or other work-relief projects

e nature of the unfair labor practice found,
mstances under which it occurred, and the
cord in the case in my opinion discloses an
nd purpose by Respondents to interfere
with the rights of employees guaranteed
ct, and convinces me that the unfair labor
found is persuasively related to other un-
r practices proscribed by the Act, and that
f their commission in the future is to be an-
from Respondents' course of conduct in
[4] The preventive purposes of the Act will
ted unless the order is coextensive with the
Therefore, in order to make more effective
dependent guarantees of Section 7 of the
revent a recurrence of unfair labor prac-
l thereby minimize the industrial strife
urdens and obstructs commerce and thus
e the policies of the Act, I will recommend
ondents cease and desist from in any other
nterfering with, restraining, and coercing
loyees in the exercise of rights guaranteed
n 7 of the Act.

basis of the above findings of fact and
entire record in the case, I make the follow-

Conclusions of Law

erating Engineers Local Union No. 3 of the
onal Union of Operating Engineers, is a
anization within the meaning of Section 2

2. By discriminating in regard to the tenure of employment of Dick W. Spiche encouraging membership in the above lab ization, Respondents have engaged in ar gaging in unfair labor practices within th of Section 8 (a) (3) of the Act.

3. By such discrimination, thereby i with, restraining, and coercing their em the exercise of the rights guaranteed in of the Act, Respondents have engaged i engaging in unfair labor practices within ing of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practice fair labor practices affecting commerce meaning of Section 2 (6) and (7) of the

Recommendations

Upon the basis of the foregoing findin and conclusions of law, and on the entire the case, I recommend that Robert S. Gu burn B. Guerin and Ed R. Guerin, in and as co-partners, doing business as R. & Company, their agents, successors, an shall:

1. Cease and desist from:

(a) Encouraging membership in Engineers Local Union No. 3 of the tional Union of Operating Engineers, other labor organization of their emp

eir hire or tenure of employment or any
or condition of employment;

) In any other manner interfering with,
aining, or coercing their employees in the
ise of the right to self-organization, to
, join, or assist labor organizations, to bar-
collectively through representatives of
own choosing, to engage in other concerted
ities for the purposes of collective bargain-
r other mutual aid or protection, and to
in from any or all of such activities, except
e extent that such right may be affected
n agreement requiring membership in a
organization as a condition of employ-
, as authorized in Section 8 (a) (3) of the

ke the following affirmative action which
l effectuate the policies of the Act:

) Make whole Dick W. Spicher in the
ner set forth in the section hereof entitled
remedy," for any loss of pay he may have
red as a result of Respondents' discrimi-
n against him;

) Upon request, make available to the
onal Labor Relations Board or its agents
xamination and copying all pay roll records,
l security payment records, time cards, per-
el records and reports, and all other records
sary to analyze and compute the amount of

South San Francisco, California, at th
office in Cedarville, Modoc County, C
and at any other projects presently op
them, copies of the notice attached h
marked Appendix A. Copies of said
be furnished by the Regional Directo
Twentieth Region, shall, after being du
by Respondents' representative, be
Respondents immediately upon receip
and maintained by them for sixty (60)
tive days thereafter in conspicuous p
cluding all places where notices to
are customarily posted. Reasonable s
be taken by Respondents to insure
notices are not altered, defaced, or c
any other material;

(d) Notify the Regional Directo
Twentieth Region in writing within tw
days from the date of receipt of this I
ate Report what steps Respondents h
to comply with the foregoing recomm

It is further recommended that, unle
twenty (20) days from the receipt of th
mediate Report, Respondents notify said
Director in writing that they will comply
foregoing recommendations, the Nation
Relations Board issue an order requiring
ents to take the action aforesaid.

As provided in Section 203.46 of the I

l, pursuant to Section 203.45 of said Rules
lations, file with the Board, Washington
an original and six copies of a statement
; setting forth such exceptions to the Inter-
Report or to any other part of the record
ding (including rulings upon all motions
ons) as he relies upon, together with the
nd six copies of a brief in support thereof;
party may, within the same period, file an
nd six copies of a brief in support of the
ate Report. Immediately upon the filing
tatement of exceptions and/or briefs, the
g the same shall serve a copy thereof upon
e other parties. Statements of exceptions
s shall designate by precise citation the
of the record relied upon and shall be
rinted or mimeographed, and if mimeo-
hall be double spaced. Proof of service on
parties of all papers filed with the Board
omptly made as required by Section 203.85.
r provided in said Section 203.46, should
desire permission to argue orally before
request therefor must be made in writing
rd within ten (10) days from the date of
the order transferring the case to the

vent no Statement of Exceptions is filed
d by the aforesaid Rules and Regulations,
gs, conclusions, recommendations, and

ings, conclusions, and order, and all
thereto shall be deemed waived for all pur

Dated at Washington, D. C., this 27th d
tember, 1950.

/s/ EUGENE F. FREY,
Trial Examiner.

[Title of Board and Cause.]

EXCEPTIONS OF RESPONDENTS TO MEDIATE REPORT OF TRIAL INER

The Respondents herewith present th
tions to the Intermediate Report of the
aminer in this case and rely upon the
grounds:

I.

That the Board is without jurisdictio
case inasmuch as the respondents were no
in interstate commerce.

II.

That the operations of respondents did
a substantial effect on interstate commerc
assertion of jurisdiction by the Board
affect the policies of the National Labor
Board Act.

III.

That the Associated General Contractors

e was a Union joinder of such necessary

IV.

le evidence does not support the findings
ial Examiner.

San Francisco, California, October 11,

/s/ JOHN G. EVANS,
Attorney for Respondents.

t of Service by Mail attached.

d October 17, 1950.

States of America Before the National Labor Relations Board

Case No. 20-CA-274

e Matter of

S. GUERIN, RAYBURN B. GUERIN ED R. GUERIN, individually and as co-ers, d/b/a R. B. GUERIN & COMPANY, ral Contractors,

and

SPICHER, an individual.

DECISION AND ORDER

tember 27, 1950, Trial Examiner Eugene issued his Intermediate Report in the tled proceeding, finding that the Respond-

tive action, as set forth in the copy of
mediate Report attached hereto. There
Respondents filed exceptions to the In
Report.

The Board[1] has reviewed the rulings o
Examiner made at the hearing and find
prejudicial error was committed. The r
hereby affirmed. The Board has considered
mediate Report, the exceptions, and the
ord in this case, and hereby adopts th
conclusions, and recommendations of the
aminer with the following additions and
tions:[2]

1. The Trial Examiner found, and we
the Respondents are engaged in interstate

---

[1]Pursuant to the provisions of Section
the National Labor Relations Act, the
delegated its powers in connection with
to a three-member panel.

---

[2]We do not predicate our findings here
evidence relating to the organization and
of The Associated General Contractors o
(AGC) or the Respondents' connection
organization. Therefore, we find it unne
pass upon the Respondents' motion to s
evidence. Nor do we find merit in the Re
motion to dismiss the complaint because o
joinder of AGC and Operating Engine
Union No. 3 of the International Union
ating Engineers, herein called the Unio
complaint herein does not allege that ei
or the Union has violated the Act, ne

it would effectuate the policies of the sert jurisdiction herein. The Respondents' s during the period from June 1, 1949, June 30, 1950,[3] which are fully described termediate Report, included the clearing, ading, and drainage of part of California ghway No. 28. This highway connects with State Highway No. 8A and portions of it with U. S. Highways 299 and 395. The eceived for this phase of the Respondents' s exceeded $683,500. As the repair and nce of roads forming a part of an artery rce constitute services to an instrumental- mmerce, and as the services rendered by ondents exceeded $50,000 for a 1-year he assertion of jurisdiction in this case vith our recently announced jurisdictional

agree with the Trial Examiner, for the tated by him, that the Respondents dis- Dick W. Spicher on July 8, 1949, in vio- Sections 8 (a) (3) and 8 (a) (1) of the

rial Examiner erroneously stated that this tended from June 1, 1949, until June 1,

ollow Tree Lumber Company, 91 NLRB Depew Paving Co., Inc., 92 NLRB No. 36.

ORDER[5]

Upon the entire record in the case and
to Section 10 (c) of the National Labor
Act, the National Labor Relations Boa
orders that the Respondents, Robert S
Rayburn B. Guerin and Ed R. Guerin, in
and as co-partners, d/b/a R. B. Guerin &
General Contractors, South San Franci
fornia, their agents and assigns shall:

1. Cease and desist from:

(a) Encouraging membership in Oper
gineers Local Union No. 3 of the Int
Union of Operating Engineers, or in a
labor organization of their employees, by
ing any of their employees or discrimi
any other manner in regard to their hire
of employment or any term or condition
employment;

(b) In any other manner interfering
straining, or coercing their employees in th
of the right to self-organization, to form
assist labor organizations, to bargain c
through representatives of their own ch
engage in concerted activities for the pu
collective bargaining or other mutual aid
tection, or to refrain from any or all of
tivities, except to the extent that such r
be affected by an agreement requiring me

or organization as a condition of employ-
authorized in Section 8 (a) (3) of the

ke the following affirmative action, which
d finds will effectuate the policies of the

Make whole Dick W. Spicher, in the manner
in the section of the Intermediate Report
"The remedy," for any loss of pay he may
fered as a result of the Respondents' dis-
on against him;
Upon request, make available to the National
elations Board, or its agents, for examina-
copying, all pay roll records, social security
records, time cards, personnel records and
and all other records necessary to an analy-
amount of back pay due under the terms
rder;
Post at their main office in South San Fran-
lifornia, at their branch office in Cedar-
doc County, California, and at any other
presently operated by them, copies of the
ttached to the Intermediate Report and
Appendix A.[6] Copies of said notice, to be

notice, however, shall be, and it hereby is,
by striking from line 3 thereof the words,
commendations of a Trial Examiner," and
ing in lieu thereof the words, "A Decision
er." In the event that this Order is en-
a decree of a United States Court of

furnished by the Regional Director for t
tieth Region, shall, after being duly sign
Respondents' representative, be posted b
spondents immediately upon receipt the
maintained by them for sixty (60) consecu
thereafter, in conspicuous places, inclu
places where notices to employees are cu
posted. Reasonable steps shall be taken b
spondents to insure that said notices are n
defaced, or covered by any other material;

(d) Notify the Regional Director for t
tieth Region, in writing, within ten (10) d
the date of this Order, what steps the Re
have taken to comply herewith.

Signed at Washington, D. C.

JOHN M. HOUSTON,
Member.

ABE MURDOCK,
Member.

PAUL L. STYLES,
Member.

[Seal] NATIONAL LABOR
RELATIONS BOARI

the National Labor Relations Board,
Twentieth Region

Case No. 20-CA-274

Matter of:
S. GUERIN, RAYBURN B. GUERIN,
R. GUERIN, Individually and as Co-part-
dba R. B. GUERIN & COMPANY,
ERAL CONTRACTORS,

and

SPICHER, an Individual.

Tuesday, July 18, 1950

nt to notice, the above-entitled matter
or hearing at 10:30 o'clock, a.m.

Eugene F. Frey,
rial Examiner.

ces:

RY BAMFORD, ESQ.,
acific Building,
an Francisco, California,
Appearing on Behalf of the General
Counsel, N.L.R.B.

N G. EVANS, ESQ.,
lobart Building,
an Francisco, California,

Trial Examiner Frey: The hearing w
order.

* * *

The Trial Examiner conducting this
Eugene F. Frey.

Now, will counsel and other represent
the parties please state their appearanc
record.

Mr. Bamford: For the General Coun
Bamford, N.L.R.B., Pacific Building, San
3, California.

Mr. Evans: John G. Evans, Attorne
Respondents, Hobart Building, San Franc
fornia.

* * *

Mr. Bamford: Yes. At this time I s
to offer in evidence the formal documer
case, which I have marked for identif
follows: General Counsel's 1-A, for ide
original charge, filed July 25, 1949; Gene
sel's 1-B, for identification, Affidavit of
General Counsel's 1-A, for identificat
registry receipt attached; General Cour
for identification, copy of First Amende
filed January 5, 1950; General Counsel's
identification, Affidavit of Service of Gene
sel's 1-C, for identification, with regist
attached; General Counsel's 1-E, for ide

having issue April 20, 1950, by the Director; and General Counsel's 1-F, for ion, Affidavit of Service of General Coun- for identification, with registry receipts

ereupon the documents above referred to marked General Counsel's Exhibits Nos. 1-F, inclusive, for identification.) [5*]

* * *

xaminer Frey: I am not going to rule ney [6] are evidentiary or not. General as stated that they are being offered as ngs and they will be received by the Ex- the formal pleadings in the record, with it numbers stated by General Counsel ffered them for identification.

ereupon the documents heretofore marked al Counsel's Exhibits Nos. 1-A to 1-F, ive, for identification, were received in ce.) [7]

* * *

xaminer Frey: It appears to me from been stated by General Counsel and coun- Respondents that there has been some between both counsel, as in most litigated he nature of pretrial conferences on the pects of the case. The Respondents' part- represented here today by two of the

I believe that under the circumstanc
deny the General Counsel's motion for
judgment on the pleadings and I will p
Respondents to file its formal answer.

Mr. Evans: Thank you.

Trial Examiner Frey: Which I will
Respondents' Exhibit No. 1.

(Whereupon the document above r
was marked Respondents' Exhibit N
identification.)

* * *

Mr. Bamford: Ed R. Guerin, please.
an [13] adverse witness, Mr. Examiner.

ED R. GUERIN

a witness called by and on behalf of th
Counsel, being first duly sworn, was exar
testified as follows:

Direct Examination

Trial Examiner Frey: Give your full
address to the Reporter.

The Witness: Ed Rayburn Guerin. Th
Roosevelt Avenue, Burlingame, California

* * *

Q. (By Mr. Bamford): Mr. Guerin
your occupation? A. Contractor.

Q. And are you the Ed R. Guerin nan
formal document in this case as one of the

ny of Ed R. Guerin.)

of certain fiscal transactions, relating to med company, and ask you if you are with this document?

es, I have seen it.

as this document prepared under your by employees of the partnership, Mr.

A. Yes. [14]

vans: Partnership of R. B. Guerin?

amford: Yes.

By Mr. Bamford): Do you know that it nce summarizes the transactions of R. B. Company during the period shown on the

A. Yes.

amford: May this be marked?

* * *

Thereupon the document above referred to marked General Counsel's Exhibit No. 2, identification.)

By Mr. Bamford): Now, I notice that at m of GC2 for identification there are listed acts. The second of these, called the Modoc ears to have been the major work per- y the partnership during the year, is that

A. Yes.

ow can you state if the purchase figure the top of the chart would relate principally odoc Job?

ell, I guess that is the way it is broken

purchased by you for the Modoc Job, Mr.

A. Well, it would involve equipment a rentals. I believe the rentals are involved the rentals of [15] equipment.

* * *

Mr. Bamford: General Counsel's 2 fo fication is offered in evidence. [16]

* * *

Trial Examiner Frey: Just a momen point. I take [17] there is no dispute betw sel on the basis of what the witness ha testified about this sheet, that the figures substantially correct?

Mr. Evans: Yes. There would be this there. Let me say this for the record: requested by Mr. Bamford—I believe it telephone conversation—and in our orig discussion had with him on July 12th, on the following day he telephoned me to we couldn't prepare some summary of ou tions; that is, to show our purchases and purchases, the amount that was made in C and the amount that would be made out fornia, and to give our rental breakdown job information, and to show under the formation the nature of the job, where located, the type of work, the amount of tract, and whether we were general or sub

ny of Ed R. Guerin.)

t time I stated to Mr. Bamford, that the so limited that it would be impossible for through our records before this hearing out all of our purchase invoices and rental ons and give a complete and accurate pic- ıose transactions within the limited period nd it was agreed that we would go through this summary to the best of our ability, the understanding that neither side would it to be absolutely correct, but only that represent our best effort to present at this rrect picture for the [18] Trial Examiner's tion.

a correct statement, Mr. Bamford.

mford: That is correct, Mr. Evans.

Examiner Frey: That brings me back to ıal question: Are counsel agreed that the here are substantially correct; that is, not he last penny or the last dollar, but sub- correct for the month and for the job set e?

vans: Well, to answer the Examiner's on that——

Examiner Frey: I am not trying to ask Evans, to say whether it is 90 per cent 80 per cent correct, but they are correct tent that your client was able to get the gures within the limited time afforded, is

our transactions as indicated, but owing to
and inability of insufficient time, there n
mistake in one direction or another. But
that our best efforts and good faith were
produce that and we feel that that should
tially reflect our operating conditions.

Was that your understanding, Mr. Bam

Mr. Bamford: Correct, Mr. Evans.

Trial Examiner Frey: On that basis I
rule the [19] objection of respondents to
mission of the document and admit it as
Counsel's Exhibit No. 2.

(Thereupon the document marked
Counsel's Exhibit No 2, in identificat
received in evidence.)

* * *

GENERAL COUNSEL'S EXHIBIT No. 2

List of Purchases
From June 1, 1949, to and Including June 30, 1950

	Gross Purchases	California Purchases	Out of State Purchases
e, 1949, V25	$ 88,086.92	$ 77,508.75	$ 1,209.17
y, 1949, V28	48,544.34	40,959.15	5,010.19
ust, 1949, V27	51,014.59	43,621.68	5,393.78
tember, 1949, V33	55,733.47	31,452.30	4,709.89
ober, 1949, V35	70,778.46	36,829.86	2,811.17
ember, 1949, V38A	70,459.37	23,011.02	450.96
ember, 1949, V39	87,367.04	17,144.47	(2,124.45)
uary, 1950, V43	7,254.71	4,981.28	(6.50)
ruary, 1950, V44A	42,790.00	17,531.94	.....
ch, 1950, V46	21,184.93	13,657.20	83.69
il, 1950, V48	24,593.62	23,234.57	603.50
, 1950, V51	29,794.13	16,980.14	206.21
e, 1950, V54	30,680.98	12,575.83	417.60
.....	$629,282.56	$359,488.19	$18,765.21

Cash Purchases
From June 1, 1949, to and Including June 30, 1950

e, 1949	$ 509.42	$ 509.42	.....
y, 1949	29.00	29.00	.....
ust, 1949	784.92	784.92	.....
ember, 1949	1,166.03	1,166.03	.....
ber, 1949	1,671.11	1,671.11	.....
mber, 1949	309.47	309.47	.....
mber, 1949	521.66	521.66	.....
uary, 1950	none	none	.....
ruary, 1950	none	none	.....
ch, 1950	152.52	152.52	.....
l, 1950	32.48	28.70	$3.78
1950	none	none	
e, 1950	25.88	21.15	4.73
.....	$5,202.49	$5,193.98	$8.51

n	For Whom	Location	Gen. or Sub.	Nature
	So. San Francisco Land & Improvement	So. San Francisco	General	Filling and Developi
	Calif. Dept. of Public Works	Alturas-Cedarville	General	State Highway
	So. San Francisco Land & Improvement	So. San Francisco	General	Filling and Developi
J"	San Francisco, California	San Francisco	Sub	Excavating and Back
"K"	San Francisco Bridge Co.	So. San Francisco	General	Filling

3, 1950.

y of Ed R. Guerin.)

Mr. Bamford): Mr. Guerin, to return
art, apart from equipment rentals, what
rincipal items represented in the "gross
' figures?

* * *

ll, there would be cement, reinforcing
igated [20] pipe. There will be gasoline,
motor oils. There would be purchases of
uipment—pickups, trucks, tractors.

xaminer Frey: You are referring now to
representing the Modoc Job?

ness: Yes, but that is including rentals.

xaminer Frey: All right. Proceed.

ntinuing): But I think, generally, if I
e brief it, it is the general run of any
I don't believe labor is included in there,
substantial amount, but it is ordinary
There have been tire purchases, natur-
g bits, rooter points, I suppose stationery,
stuff like that.

nford: I was referring to the printed
ch would be steel and concrete, apart
pment rentals? A. Yes.

ere do you procure your steel from?

l, I think, yes, the Bethlehm Steel in
Francisco, fabricated that.

your concrete?

cement was manufactured at Los Gatos,

(Testimony of Ed R. Guerin.)

Q. That is what I was getting at. Thar

A. There was corrugated pipe, I believ tioned, in the [21] general run of the pu

Q. Where do you procure that?

A. That is the Consolidated Western Steel Corporation, in South San Francis the diesel fuel and gasoline, which was a s amount, was all California products, and oils, greases and so forth.

* * *

Q. (By Mr. Bamford): Now, did you outright any equipment during this pe Guerin? A. Oh, yes.

* * *

Q. Well, both the Modoc Job and smaller jobs listed here, did you purc equipment outright during this period?

A. Yes, we have purchased quite a fe and trucks. [22]

Q. Light equipment? A. Yes.

Q. Where did you procure them?

A. All in the State of California. I th was some bought locally there in Alturas, t some bought in Sacramento, and I th bought in South San Francisco.

Q. What makes did you purchase, do y

A. Well, I think we got five or six GM and I think there are two or three Inte

ny of Ed R. Guerin.)
equipment that you purchased outright
is period of time?
would say $50,000 or $60,000.
w, with respect to equipment rentals, could
in just what that expression signifies?
ell, we would rent heavy equipment from
rces. One big account we had, was a
aterpillar dealer in Los Angeles, and then
l from individuals. One outfit, I believe
es were in Eureka, California, but their
t happened to be in Redding, which was
se to the job.
w, was the bulk of the equipment rental
a transaction under which you had the
buy the equipment, Mr. Guerin? [23]
ell, I wouldn't say the bulk of it. Well,
would be a little bit over half.
l you exercise those options?
, we haven't.
ve they lapsed? A. Oh, yes.
w, could you approximate what the total
ld be of the equipment which you rented
e period from June to June, 1949 to 1950?
ell, I would say that it would be around

d that was all——
resume now. Let me qualify that?
s.
other words, I presume a lot of that

would be at the time that it was on th
being used.

Q. Was some of it new, when it wa
livered to you?

A. Yes, some of it was. I would say
out of about 20 or 25 pieces were new
new and delivered on the job new.

Q. Representing about a third or a fou
total of value of the equipment?

A. Well, let's see.

Mr. Evans: I think that the answe
itself, six [24] pieces out of 20 or 25, the p
I think. That is in the record, isn't it?

The Witness: Well, you understand, i
something new—now, I will make a c
with one new "cat," equipped with all
mings and bulldozers, is around $19,000.
able to get a similar "cat" for $6,000 or
years ago, depending upon the condition

Q. (By Mr. Bamford): So that t
value of the new equipment that you ren
be greater in proportion than the dolla
the older equipment?

A. Just as I said, about a third.

Q. Even though the rental would be
mately the same?

A. I would say about a third.

Q. Well, could you say that of the
$200,000 that the new equipment which

ony of Ed R. Guerin.)
Vell, it might. Between $100,000 and $150,-
ould say.
Vell, now, did the majority of that equip-
ne orginally from outside the State of Cali-
Mr. Guerin?
vans: Which equipment?
amford: All of the equipment now. The

Vell, now, I am not familiar with what goes
ickup truck. I believe they are assembled
re in California. What percentage is actu-
ufactured here I wouldn't [25] actually be
tate. But, with caterpillars, I don't know
ny have a little "SP" on the end of the
mber, and that means San Leandro, which
the Bay, and "Peoria," but what per-
of one "cat," we will say, is made in Cali-
nd the other percentage in Peoria, I don't
d I don't know how many have that serial
that we had on the job that had the "SP"

By Mr. Bamford): Well, of the new equip-
t was furnished you, could you tell there
e origin had come?
Vell, I could say definitely it came from

ne majority of the new equipment came
oria?
es, but there are parts of that equipment

goes back to Peoria and then it is finally
there.

Trial Examiner Frey: When you say
you mean Peoria, Illinois.

The Witness: Peoria, Illinois.

* * *

Q. (By Mr. Bamford): What Califo
number did this highway job bear?

A. It is District Two, Route 28, Sectio

Q. How long is the project on which
working? [26] A. It is 8.104 miles.

Trial Examiner Frey: Was your secti
project built between Tom's Creek and C

The Witness: That is right.

Trial Examiner Frey: In Modoc Co

The Witness: Yes.

Trial Examiner Frey: All right. Proc

Q. (By Mr. Bamford): Now, does
join U. S. 395 at some point in California
branch road off U. S. 395, isn't it?

A. I believe it is.

Q. And doesn't it run into Nevada, I

A. Yes. You can go into Nevada by
this road.

Trial Examiner Frey: When was you
this project completed?

The Witness: It isn't completed yet.

Trial Examiner Frey: Not completed

ny of Ed R. Guerin.)
itness: No.
Examiner Frey: Does it appear on any
tate Highway Map that you know of in a
ne or by some other indication, indicating
an incompleted part of the road?
itness: Yes, it will show an incompleted
n the end of our job on to, over to where
on to the State of Nevada. It is Route

* * *

Cross-Examination

Evans: [30]

* * *

amford: No further questions of this wit-

Examiner Frey: Just a moment. I have

ou describe in general terms how much
onstruction of State Highway No. 28 you
ing out under the Modoc Job?
itness: I believe it would be 90 per cent.
Examiner Frey: I mean in terms of what
he highway you are building. [32]
itness: Well, we are doing the clearing
ght-of-way, the grading, which is about 90
of the entire job in dollars and cents, and
rainage, and a very little concrete. I guess
about all. We are not doing any other

Examiner Fey: Will the paving be don
contracto?

Witness: Ye sir.

Examiner Fey: How wide a highway i

Witness: Wll, it is a standard two-lan
It is abou 30 or 40 feet wide. It wil
and 36 to0 feet wide. [33]

• • •

Examiner Fey: This is at my request.
information for my own purposes; since
of the fats and I have got to get all th
together for the benefit of the Boar
it might e helpful if the record would
highway his construction was part o
of hat highway to others in th
why Iasked for any official map o
which might show those figures
th small map from the State o
is map from the State of Cali
f Public Works, Division o
District . District 2 includes Modo
whi State Highway No. 28 runs
ou resume the stand? [51]
er
omplete ter Recess
ss: It
hearing was resumed, pur-
miner

Trial Examiner Frey: The hearing will come to order.

All right, proceed, Mr. Bamford.

Mr. Evans: You are reopening your case on the question of jurisdiction?

Mr. Bamford: No. I am merely answering the Trial Examiner's request and am now in possession of two maps, one furnished by the Triple A, the other furnished by the State of California, Department of Public Works, Division of Highways.

Mr. Evans: Is this going in under your theory of jurisdiction?

Trial Examiner Frey: This is at my request. I want the information for my own purposes; since I am the trier of the facts and I have got to get all pertinent facts together for the benefit of the record I feel that it might be helpful if the record would show what highway this construction was on and the relation of that highway to others in the area. That is why I asked for any official or semi-official map which might show those facts.

Now, may I see the small map from the State of California? This is a map from the State of California, Department of Public Works, Division of Highways, District 2. District 2 includes Modoc County, through which State Highway No. 28 runs.

Mr. Guerin, would you resume the stand? [51-A]

(Testimony of Ed R. Guerin.)

Trial Examiner Frey: Will the paving
by another contractor?

The Witness: Yes, sir.

Trial Examiner Frey: How wide a hig
this?

The Witness: Well, it is a standard
highway. It is about 30 or 40 feet wide.
average around 36 to 40 feet wide. [33]

* * *

Trial Examiner Frey: This is at my rec
want the information for my own purposes
am the trier of the facts and I have got to ge
pertinent facts together for the benefit of th
I feel that it might be helpful if the recor
show what highway this construction was
and the relation of that highway to other
area. That is why I asked for any official
semi-official map which might show those

Now, may I see the small map from the
California? This is a map from the State
fornia, Department of Public Works, Div
Highways, District 2. District 2 includes
County, through which State Highway No.

Mr. Guerin, would you resume the stan

After Recess

(Whereupon, the hearing was resume
suant to the taking of the recess, at 3:30

Examiner Frey: The hearing will come to

ight, proceed, Mr. Bamford.

Evans: You are reopening your case on the
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uerin, would you resume the stand? [51-A]

Trial E
by anothe
The W
Trial E
this?
The W
highway
average

Trial
want th
am the
pertine
I feel
show
and t
area.
semi-
N
Cali
forn
Hig
Co

b the [52] map comprising

isn't it?
hat
s, in't it?
es.
Frey Well, the Trial Examiner,
thismap, will receive it in evi-
xaminr's Exhibit No. 1.

the ocument above referred to
Trial Examiner's Exhibit No. 1
ation nd received in [53] evi-

* * *

ED R. GUERIN
and and vas examined and testified
bws:

Redirect xamination

ord:

niner Frey All right, proceed.
Mr. Bamfor): Mr. Guerin, in July,
B. Guerin ad Company requiring that
ees and specifically new employees en-
eavy duty mchanic work be cleared by
Engineers Leal 3?

* * *

resumed the stand and was examined and
further as follows:

Cross-Examination
(Continued)

Trial Examiner Frey: Since the Trial E
asked for this information, I will ask Mr.
some questions based on this map.

Trial Examiner Frey: I show you th
produced for the Trial Examiner by the
Counsel, and ask you to indicate by pencil n
on it, as closely as you can, what part of I
in Modoc County is being constructed by y
can indicate it by a cut mark across the l
two cut marks across the highway.

Mr. Evans: Mr. Examiner, do you wish
that first introduced?

Trial Examiner Frey: Well, after it is n
will make it an Examiner's Exhibit.

All right, will you mark the map?

The Witness: Well, our job goes withi
one mile of Cedarville, I'd say about there
comes back to, well, about here, I'd say.
pretty small scale there.

Trial Examiner Frey: All right. Are th
agreed that this map on the scale indicated
stantially accurate?

Mr. Evans: On the scale as shown ther

lony of Ed R. Guerin.)
to be covered by the [52] map comprising
; 2.
Evans: It is, isn't it?
Witness: What?
Evans: It is, isn't it?
Witness: Yes.
Examiner Frey: Well, the Trial Examiner,
s called for this map, will receive it in evi-
s Trial Examiner's Exhibit No. 1.

Thereupon the document above referred to
s marked Trial Examiner's Exhibit No. 1
identification and received in [53] evi-
ıce.)

* * *

ED R. GUERIN

l the stand and was examined and testified
as follows:

Redirect Examination

Bamford:

Examiner Frey: All right, proceed.
By Mr. Bamford): Mr. Guerin, in July,
as R. B. Guerin and Company requiring that
ployees and specifically new employees en-
or heavy duty mechanic work be cleared by
ng Engineers Local 3?

* * *

resumed the stand and was examined and
further as follows:

Cross-Examination
(Continued)

Trial Examiner Frey: Since the Trial E
asked for this information, I will ask Mr.
some questions based on this map.

Trial Examiner Frey: I show you th
produced for the Trial Examiner by the
Counsel, and ask you to indicate by pencil n
on it, as closely as you can, what part of I
in Modoc County is being constructed by y
can indicate it by a cut mark across the l
two cut marks across the highway.

Mr. Evans: Mr. Examiner, do you wish
that first introduced?

Trial Examiner Frey: Well, after it is n
will make it an Examiner's Exhibit.

All right, will you mark the map?

The Witness: Well, our job goes withi
one mile of Cedarville, I'd say about there
comes back to, well, about here, I'd say.
pretty small scale there.

Trial Examiner Frey: All right. Are th
agreed that this map on the scale indicated
stantially accurate?

Mr. Evans: On the scale as shown ther

lony of Ed R. Guerin.)
to be covered by the [52] map comprising
2.
Evans: It is, isn't it?
Witness: What?
Evans: It is, isn't it?
Witness: Yes.
Examiner Frey: Well, the Trial Examiner,
s called for this map, will receive it in evi-
s Trial Examiner's Exhibit No. 1.

Thereupon the document above referred to
s marked Trial Examiner's Exhibit No. 1
identification and received in [53] evi-
ice.)

* * *

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or heavy duty mechanic work be cleared by
ng Engineers Local 3?

* * *

(Testimony of Ed R. Guerin.)

and it was up to the delegate—if a man go into the Union, if he wished to go in t clear him and I suppose through some ar that I don't know anything about—may a permit deal or maybe it was signing up a member of the Union, but we as contract care whether they belonged to the Unic We always hire all the localities that v account of living conditions. It was a t of the country, housing was scarce and we luck—that is, within reason—if a man petent to hire local fellows.

* * *

Q. (By Mr. Bamford): Mr. Guerin, I what purports to be a letter from R. B. G Company to the National Labor Relatio dated July 28, 1949. Can you identify t sir? A. Yes, I signed it.

Q. This is a letter which was sent by y pany to us? [61] A. Yes.

Mr. Bamford: May it be marked, General Counsel's Exhibit next in order?

* * *

(Thereupon the document above re was marked General Counsel's Exhi for identification.)

* * *

ıy of Ed R. Guerin.)
l paragraph of that letter. Will you read
se?
urthermore''—is that it?
, sir.
—it is our understanding that we must
nion members in good standing or those
become affiliated with a Union or else
Unions pull their members off the project.''
ht. [62]

* * *

r Mr. Bamford): Now, how do you square
your statement that you weren't requiring
employees to be approved by the Union?
vas up to the Union delegate to sign them
ve them permits or ask them to join the
nich happened in many cases up there.
ening right now up there.
ll, was it your policy if the Union refused
new employee that you would then refuse
n or keep him on your pay roll?
vas agreed when we went on the job that
l clear anyone that was competent enough
a job up there. I am talking about car-
· 'catskinners or shovel crews or grease-
or mechanics—any of the crafts that we
ve to accomplish the job.
ll, on your part was it your agreement
would employ only those who were cleared

pull their regular members off? We had
and fifty, two hundred people up there.

Q. Was this policy made known throu
operation to your supervisors?

A. Absolutely.

Q. Was the policy known to Lloyd Ma
master mechanic? [63]

* * *

Q. But what I am trying to get at, M
is was it your policy and the policy of the
that if the Union wouldn't clear a man
would not hire him or not keep him in
ployment? A. No, that was not the

Q. Again I direct your attention to this

A. I didn't write the letter, although
it. I don't believe that was our general
cause it didn't prove out that way. We
starting the job along about that time.

Q. Did you read the letter before you
Mr. Guerin?

A. I probably glanced through it. I
it more now than I did when I signed it.

Q. Who did write the letter?

A. Our bookkeeper, George Perry.

Trial Examiner Frey: Who gave him
to write it?

The Witness: Well, I think there was
of a citation came in and it was all writte

ny of Ed R. Guerin.)
don't see anything wrong with it. We
r contract up there, have a penalty for
n and everything else and Number One
e good help and plenty of help and [65]
with anybody, Unions or anybody else.
y Mr. Bamford): How long have you
ie contracting business?
out 40 years. I will admit too long.
ior to 1949 had you, in the contracting
ever done business with the Operating En-

ny, I remember them before they were ever
My oldest boy is a charter member of No.

* * *

asn't it the usual arrangement between
he Operating Engineers that if you hired
n not through the Union but on your own
man would join the Operating Engineers?
s, ultimately. They were tickled to death
t.
Examiner Frey: Did you ask them to or
m to join under your old hiring and train-
ices?
itness: No, we didn't care whether they
not, but what are you going to do, Mr.
, when just for the sake of one individual
a hundred men will walk off the job. That
pleasant too, you know. You can't swim

Union; but it wasn't any of our busine
narily, I have never heard of a case whe
had an opportunity to go in the Union
never heard of any case where they weren
to go in, so that would relieve us of an
beef on it.

* * *

Q. Wasn't it the understanding up the
Cedarville job, Mr. Guerin, that all the he
mechanics had to belong to the Opera
gineers or else get cleared by them?

A. Get cleared, I will go for that, yes

Trial Examiner Frey: What would
done if some weren't cleared,

The Witness: Well, by gosh, I never
anybody that they wouldn't clear, the in
and we had no occasion to ever run anybo
my knowledge.

Trial Examiner Frey: You just said th
business you can't swim upstream and
afford to get in trouble with anybody, me
Union. What trouble are you referring to
referring to their refusal to clear a man

The Witness: I don't remember of t
refusing them.

Trial Examiner Frey: What did you m
by that [67] statement you just made?

The Witness: Well, I believe he asked

Trial Examiner Frey: Now, wait. I

ıy of Ed R. Guerin.)
ich the witness said, "In this business you
n up stream," and read that answer back
ness.

ıswer read.)

xaminer Frey: Now, what did you mean
ıswer?
tness: You mean swimming upstream?
Examiner Frey: No, no. The previous
that, in that answer. Read them to him

ıswer read.)

xaminer Frey: What did you mean by
ment?
tness: I meant this: In other words, I
came about through asking me questions
long I had been in the business, in the
g business, and I said I was in before the
really heavy, and I believe in the last
ar they came in very much to prominence,
ally all of our jobs—we would like to have
long peacefully and finish them on time,
s why I meant we couldn't swim upstream.
go along with the trend.
xaminer Frey: You mean you had to do
Unions wanted?
tness: Pretty near.
Examiner Frey: Does that mean, then,
were [68] afraid that if one individual

(Testimony of Ed R. Guerin.)

The Witness: Well, that is possible.

Trial Examiner Frey: Well, is that meant by that statement there?

The Witness: Yes, I will say that i meant, yes.

Trial Examiner Frey: All right. Proc

Q. (By Mr. Bamford): You testified, that this policy was known up on the job, the heavy duty mechanics had to be with the Engineers?

A. I believe there was times there w dred per cent; everybody was Union, laborers.

Q. I am asking what your policy was many members there were up there. Was policy up there that everybody, all of y duty mechanics and your operators, too, had to be organized with Local 3?

A. Well, sure.

Q. And that policy was made know supervisors, is that correct?

A. Certainly. They were all Union me

Q. And your master mechanic, Lloy was a supervisor? A. That is correc

Trial Examiner Frey: Was he a Unio

The Witness: Yes.

Mr. Bamford: No further questions- one more thing. Since this has been dis

ıy of Ed R. Guerin.)

xaminer Frey: The objections are over-
the letter marked as GC 6 for identifica-
be admitted in evidence with the same

ıe document heretofore marked General
sel's Exhibit No. 6 for identification was
ed in evidence.)

RAL COUNSEL'S EXHIBIT No. 6

R. B. Guerin & Co.
and E. R. Guerin
General Contractors
P. O. Box 201
South San Francisco, California

July 28, 1949

ates of America,
Labor Relations Board,
on,
cisco, California.

ject: Complaint—R. W. Spicher

:

in receipt of your complaint filed by R. W.
resident of 1503 Austin St., Klamath
gon and beg to inform you that the state-
le by Mr. Spicher are erroneous and with-
ation as far as the liability of this com-

mechanic nor by any partner of the con
was informed personally by the busi
resentative of Local No. 3, Operating
of Redding that he could not work on th
other project unless he was reinstated ar
a member in good standing. We were lik
by this representative that we could not
man on the job in violation of our contra
agreed by the Associated General Contr
America, Incorporated, of which we are a
This Association represents all contractor
gotiates all contracts with the Labor U
tailing all types of crafts. Furthermore,
understanding that we must employ union
in good standing or those willing to becom
with a union or else have the unions
members off the project.

We wish to further state that, "no un
practice was committed by the employer th
assistance of the union" as you state in y
of pertinent facts. We reiterate that
resentative for the Operating Engineers
sponsible for this man's removal from th

It is felt that the demands made by t
re rein-stating Mr. Spicher is the persona
sibility of the Operating Engineers in it
and no concern of this company.

As general contractors we are not en

ıy of Ed R. Guerin.)

e a complaint against this firm instead of
ɛr party involved, the union, who is re-
for his having been terminated.

Very truly yours,

/s/ E. R. GUERIN.

ın]: G.C:6.
7/18/50.
GUERIN.

d Aug. 1, 1949, N.L.R.B.

ed July 18, 1950.

* * *

Redirect Examination

amford:

l Mr. Martin have power to discharge em-
A. Yes.

* * *

a witness called by and on behalf of th
Counsel, being first duly sworn, was exar
testified as follows:

Direct Examination

Trial Examiner Frey: Give the repo
full name and address.

The Witness: Dick Spicher, 1503 Aust
Klamath Falls, Oregon.

Q. (By Mr. Bamford): Mr. Spicher,
ever employed by [72] R. B. Guerin and C

A. Yes.

Q. Are you employed there now?

Q. When did you first go to work f
Guerin and Company?

A. Sometime in July of '49.

Q. Did you apply for the job with Gu

A. No.

Q. How did you first hear of the job at

A. Well, there was a fellow that had
on this job, that used to live in the Falls.
his name, but he called my wife, referri
job; wanted me to come on this job at C
Well, at the time I was working at Madr
Warm Springs Lumber Company, so I h
call and find out the whole details, all abou
So she found out and then they called me
I quit up there and came down on the C
job.

y of Dick W. Spicher.)
ı went to Cedarville, speak to this fellow
your wife?
. He called me the night that I got home
ras and then the next morning this fellow
Guerin office in Cedarville called me and
know if I could get down there right
re was a need of me, and I told him it
probably around noon the following day.
t a minute. In this conversation with the
m [73] Guerin's office, was there anything
Unions or clearance with Unions?
. I asked him about getting cleared with
and he said I was already cleared. He
ne on down and go to work."
l did you go down then? A. I did.
you work that day?
not the day I got there.
you work the next day?
next day I went to work—that morning.
at was your job there?
avy duty mechanic.
at was your rate of pay?
22½.
ı say you worked the next day after you
or work? A. Yes, sir.
o was your supervisor?
yd Martin. [74]

* * *

(Testimony of Dick W. Spicher.)

A. No. I reported next morning to
the master mechanic, Lloyd Martin, I
wanted me to come back on the evening shi

Q. Did you come back at 3:30?

A. I came back for the evening shift

Q. Did you work that evening shift?

A. No.

Q. How did that happen?

A. The Business Agent from the U
there——

Q. Just a minute. Do you know the
Agent's name?

A. I believe it was Archibald, the na
Business Agent.

Q. Had you met him before? A.

Q. Did he introduce himself? A.

Q. What Union was that, Mr. Spiche

A. It was Local 3.

A. The Operating Engineers? A.

Q. Did you have a conversation with M
bald, if that [75] was his name?

A. Yes, a short one.

* * *

Q. (By Mr. Bamford): Now, where
conversation take place?

A. It took place just outside the shop d
in Cedarville.

Q. Was anyone else present within e

ıy of Dick W. Spicher.)
ell, Lloyd Martin was inside there.
fore the conversation ended between you
lbald, did Martin join the conversation?
, he just came up——
l he come within earshot during the con-
? A. Come where?
l he come within earshot while you were
ith Archibald?
s, I will say he was. [76]
ll you tell me what was said and by whom
nversation, please? [77]

* * *

tness: Archibald came up and said to me,
if I had my book and clearance and I said,
have my book with me and they cleared
gh the office here."
y Mr. Bamford): What did Archibald

chibald asked Lloyd Martin there if he
learance.
d Martin come up after that conversation?
ght then he came up and Martin says,
nd he stood there awhile and Archibald
ere is nothing I can do for you, then,"
ys he had men down there in the Local
r a job to take my place, so I asked him
ney wanted me to work that night and
says, "Can you get along without him?"

said, "Well," he said, "I guess I can't then," so they got in their car and went the road. I don't know where they went

Q. At that point did your employment with R. B. Guerin? A. Yes.

Q. Did you leave their premises?

A. Yes. [79]

Q. And you didn't work that night?

A. Didn't work that night.

Mr. Bamford: Mr. Examiner, for the of establishing dates, Counsel are prepared late that the day that Mr. Spicher worked 7 and the day he was terminated was Jul

Trial Examiner Frey: The record will

Mr. Evans: So stipulated.

* * *

Cross-Examination

By Mr. Evans:

Q. Well, you tell us, Mr. Spicher, that called up your wife that had a couple of c job and told her there was a job over the

A. Yes.

Q. Do you know if he said he was con any way with Guerin Brothers or R. F Company?

A. He had two cats on the job, yes.

Q. What capacity, did he tell you?

A. I believe it was clearing

ıy of Dick W. Spicher.)
w, I wouldn't say.
ll, the fact of the matter is the man's
Murien, [80] wasn't it?
elieve it was.
ıt's right, and he was a sub-contractor on
) there with a man by the name of Cox?
s.
ınning a couple of cats?
ll, I don't know if his name was Cox. I
ıad a couple of cats.
ll, Murien was the man that talked to your

elieve that was his name, Murien.
ıen you got on the job you found out he
)-contractor for Guerin, didn't you?
on't know if I found out he was a sub-
or not. There was nothing ever said to
that.
at did you see him doing when you got
?

* * *

tness: He was there in the shop—— [81]

* * *

xaminer Frey: Read it back to him, what
to say.

ıestion and answer read.)

tness: That's right, he was there in the

A. No.

Q. Had you known Mr. Murien before out there on that job? A. No.

Q. Do you know why he would have up regarding this work?

A. From a friend that he knew the Falls that used to work with me at C. A contractor there in the Falls.

Q. In other words, you didn't know all? A. No, I didn't.

Q. And some friend of his knew about and called him? A. Yes.

Q. And he in turn called you?

A. Yes. [82]

* * *

Q. Did you ever talk to Murien hims your wife do all the conversing? A.

Q. When you conversed with Murien, did he not tell you that this job was off friend of his and he suggested you go apply for it? A. No.

Q. He didn't tell you that? A.

Q. Now, you tell us that after you Murien and asked him about the condi the salary and so forth out there some Guerin's office called you? A. That

Q. Do you remember what that ma was? [83] A. No.

ny of Dick W. Spicher.)
ell, he was in the office when he handed
ard to sign when I first went in there.

* * *

u say he telephoned to you, is that correct?
at was the morning I went down there. He
d me and that was the same guy that
ie this card at the Guerin office at Cedar-
had me sign it.
d he tell you he was the man who had tele-
ou? A. Yes.
you have that card he gave you?
, they kept the card.
you don't know what that man's name
A. No.
as it any of the Guerins; there is Mr. Rob-
erin, sitting here, Mr. E. R. Guerin, who
or Mr. Martin? A. Neither one.
you don't know who he was?
.
d what did you——
Examiner Frey: Do you know what he
the card after you signed it?
itness: Put it back in his file with the
e [84] cards. All he done——
Examiner Frey: Did you see him put it in

itness: Yes. All he done was hand it to
ned it and he put it back in the file.

you introduce yourself to this man or hov
make yourself known to him?

A. I introduced myself to him.

Q. And you told him you were Spich

A. Yes.

Q. Did you tell him you were a he
mechanic? A. I did.

Q. And you were a heavy duty mechan
time? A. Yes.

Q. And you had experience before in
that type? A. I had.

Q. With cats and jeeps?

A. Cats and shovels and all.

Q. And with jeeps? A. Yes, jee

Q. Well, about how much experience
had at the time you applied for this work

A. Well, around approximately 16 yea

Q. About 16 years; can you give us s
where that [85] experience was gained,
employers?

A. Well, there is six and a half years
Dunn, a contractor in Klamath Falls; ther
years at General Motors at Klamath Falls
Corporation, General Motors dealer; and
year and a half in at Morris and Knutse
don't know just how much time at Butler
tion out at Spokane.

Q. Well, now, let us go back to when
with Dunn. What were your specific dut

ıy of Dick W. Spicher.)
avy duty mechanic. The last year there I
er mechanic, the last two years.
d what type of operation did he have,
k did he do?
ell, the last two years we were building
down here in California at Weitchpec,
River.
ilding a bridge? A. Yes.
w, in those operations how many cats were
ou remember?
ell, himself, he had only eight; then there
s several rented.
d you were in charge of the repairing of
ment?
repairing—not all the time that I was in
.
xaminer Frey: This is on the Dunn job?
itness: Yes.
xaminer Frey: At the bridge? [86]
tness: Yes. Well, on the bridge job I was
of all of it, yes.
y Mr. Evans): And you say he had eight
ne? A. Yes.
d rented others? A. Yes.
d you were in charge of the repair work
A. Yes.
w, what type of cats were those—Cater-
A. They were all cats. [87]

(Testimony of Dick W. Spicher.)

Q. And they told you to come back morning and go to work? A. Yes.

* * *

Q. Or about a clearance either? A

Q. So he said, "Come back and work shift"? And when you went back to work shift you found Mr. Archibald, I believe fied, from the Union there?

A. That's right.

Q. And now, you related in substance versation that [90] was held between you Archibald at that time in your direct testin told us the substance of it? A. Yes

Q. Well, how did you know Mr. Arc how did he know you at that time? Di troduce yourself to him or did he introduc to you?

A. He introduced himself to me and duced myself to him.

Q. You walked right up and saw this n and knew that was Mr. Archibald?

Q. How did you know him?

A. He introduced himself as a Busin resentative, as Archibald.

Q. Did he say he knew you?

A. No, he didn't know me.

Q. How did he know that you were S

A. I told him my name. Then he asked

ny of Dick W. Spicher.)
no else was standing there when you first
Mr. Archibald? A. Lloyd Martin.
d Mr. Martin introduce you to him?
ell, I wouldn't say that he did. I don't
hat time whether he did or not. [91]
ll, then let me ask you this: Who spoke
or Archibald? A. Archibald.
at did he say?
ll, the first thing he asked me my name,
nd then he introduced himself as Archi-
ld him my name and he introduced him-
chibald.
d at that time was Martin standing there?
rtin wasn't right there at the minute, no.
right. Well, now, when he said, "I am
," and asked you your name, what did he
to you and what did you say to him? I
to have the conversation just as it was.
asked me if I had my Union book and
for this job and I said, "I don't have no
k with me," and I said, "They cleared
h the office here."
at did he say to you?
ll, he asked Lloyd Martin if he knowed it.
ll, had Martin come back in in the mean-
A. Martin came up about that time.
he asked Martin if he "knowed" it, and
was said by Mr. Archibald to you and

(Testimony of Dick W. Spicher.)

Q. Just that is all he said? [92]

A. That's right.

Q. When you said you didn't have a
you had been cleared through the office
said to you he can't do anything for you?

A. He said, "I can't do anything for
said, "I got men at the Local waiting f
job."

* * *

Trial Examiner Frey: What are the d
heavy duty mechanic?

The Witness: Well, all major overhau
pairs.

Trial Examiner Frey: On what?

The Witness: On all types.

Trial Examiner Frey: Of what?

The Witness: Cats, shovels, trucks and

Trial Examiner Frey: Have you perfo
work on all those types of equipment d
sixteen years of your experience?

The Witness: No, not on all types, n

Trial Examiner Frey: Well, have
formed the heavy duty mechanic work o
type during the sixteen years?

The Witness: Well, yes.

Trial Examiner Frey: Which one?

The Witness: On the cats, overhauled
overhauled the feed-link-belt-shovels, grad

y of Dick W. Spicher.)
tness: Yes.
Examiner Frey: And in that overhaul
t parts of the equipment do you work on?
tness: In the overhaul work?
xaminer Frey: Any overhaul work.
tness: Well, final drives, transmissions,
[124] motors.
xaminer Frey: Do you have to have any
nowledge in overhauling a transmission,
upon how many forward and reverse
t a transmission has?
tness: Well, I suppose so, but you most
get a book to go by there, on tearing it
putting it together. I wouldn't say you
e to have too much knowledge.
Examiner Frey: I suppose you had a
r tractor which had a transmission some-
an ordinary automobile transmission, with
forward speeds and one reverse, and you
to tear down and repair and overhaul that
on. Would you have to have any more
owledge or any special training in order
wn a transmission on a D7 tractor which
orward speeds and four reverses?
itness: No, not if I tore it down, you

Examiner Frey: How about repair and
n of replacement parts in it?
tness: How about what?

place any parts in a transmission on a
than you would have to have in an ordin
speed forward and one-speed reverse tra
The Witness: Yes, you would have
little. [125]
Trial Examiner Frey: You say that
three working years, three years worki
General Motors dealer?
The Witness: General Motors.
Trial Examiner Frey: What was the
that dealer?
The Witness: West Hitchcock. I p
myself in that, eighteen months.
Trial Examiner Frey: On what wor
The Witness: Major motor overhauls
Trial Examiner Frey: You mean
Motors diesel tractors?
The Witness: Motors, yes.
Trial Examiner Frey: And the other
a half you worked where?
The Witness: I worked for myself.
Trial Examiner Frey: Doing the same
The Witness: Doing the same work.
Trial Examiner Frey: During that th
did you work on just diesel tractors?
The Witness: No, no.
Trial Examiner Frey: On what else?
The Witness: On cars and trucks, ri

ıy of Dick W. Spicher.)
ıring the year and a half with Morrison—
ıe other name?
itness: Knudsen. [126]
xaminer Frey: Morrison-Knudsen.
Vitness: Working on trucks, cats and epairing them.
xaminer Frey: How about your work for ınstruction Company?
itness: Well, working on trucks, and so vas the same thing.
Examiner Frey: How long did you work ?
itness: I don't know just how long I did Butler Construction.
xaminer Frey: Was that after Morrison-
itness: Yes. [127]

* * *

xaminer Frey: General Counsel rests?
mford: Yes. [130]

* * *

ED R. GUERIN

a witness by and on behalf of the Re-, having been previously duly sworn, was and testified further as follows:

Direct Examination

vans:

(Testimony of Ed R. Guerin.)

Q. And you have testified? A. Y

Q. Now, Mr. Guerin, will you state th
stances of your own personal knowledge
to the hiring of Mr. Spicher by R. B. Gu
Company on the Modoc job?

Just tell us how and in what manner he
ployed by your company.

A. Well, we were overhauling a "Ca
sub-contractor by the name of Murien, an
criticizing a mechanic that was working
time. He said, "I will get you a good
from Klamath Falls."

And I said, "There is the phone. Get h

I said, "We are just starting the job a
got a good mechanic, get him over here."

So, two or three days later, Murien cam
and Mr. Spicher was working on this ca
said, "Where in the heck did you get that

And I said, "Well, by gosh, that is a
you ordered from Klamath Falls."

He says, "Like heck I did. I never sav
fore."

So I said, "Let's go up and talk to him

So we went up and we asked what he w
what his name was and he told us. And
Mr. Spicher where—now, I don't know an
remember what this other mechanic's nam
he said, "Where is Joe Bloke?" [132]

I know that is not his name. "Well,"

ny of Ed R. Guerin.)
hat is all I know about those circum-
[133]

* * *

Cross-Examination

Bamford: [135]

* * *

w, you said, I believe, that General Coun-
or identification—I mean General Coun-
he letter signed by you on the date of
1949, was in fact prepared by Mr. Perry,
rrect? A. That is right.
d he prepare it and did you sign it at
e? A. Yes.
. Perry was your bookkeeper on that job,
orrect? A. Yes.
Mr. Perry still in your employ?
, he isn't.
hen did he leave your employ?
ell, I think around the 15th or 20th of De-
f last year. That is when we shut down
inter.
w long had he been working for you at the
uit or at the time he was terminated?
elieve he started at the time we began the
nd the tenth or 15th of June.
ot too clear, but when we started the job,
it was around the middle of June or some-
here.

charge that [136] was filed on behalf of Mr
is that correct.

A. Yes. There was some notice. He ju
it to me and I said, "Well," and he w
letter.

I don't know, but it seemed to me th
some governmental or official document
sort.

Q. Mr. Guerin, I have here what purp
a copy of a letter from the Twentieth
NLRB, to R. B. Guerin and Company, u
of August 25, 1949.

Will you examine the letter, please?

A. Yes, I believe it was a letter somet
that. It seems familiar. Yes, I think I
that.

Mr. Bamford: With your permission,
would just like to read the letter in. I
short.

Mr. Evans: You can introduce it in.
maybe the Examiner and the Board woul
have it in. Introduce it in evidence and
can read it, if you want to. I am just
suggestion. I am not trying to make y
Either way you want to do it.

Mr. Bamford: I would prefer just to r
It is a standard letter. I have already
the sender and the address and the date. T
reads:

y of Ed R. Guerin.)

tlemen:

his will inform you that a charge has been
n the above-entitled case. A copy is en-
. Also enclosed are two copies of an In-
te Commerce form. [137] Please fill in
eturn one copy and retain the other for
file.

ie investigation of this case has been as-
l to Field Examiner Albert Schneider,
vill contact you in the course of the in-
ation. In the meantime, please submit
s office your version of the matters of the
e.

ery truly yours, Gerald A. Brown, Re-
Director."

Mr. Bamford): Now, your memory is,
it was in response to this letter, that you
r letter? A. I believe so.

July 28th?

. Yes, it seems to be in sequence all right.

ns: That was July 25th, wasn't it?

nford: Yes.

Mr. Bamford): And I take it that you
ur letter over to Perry and asked him to
is that correct? A. Yes. [138]

* * *

xaminer Frey: Just a minute. I refer

(Testimony of Ed R. Guerin.)

Trial Examiner Frey: After Spicher as you testified, how he came to be ther was anything further said by Murien?

The Witness: Well, we were overh "cat" on a cost basis and he was quite some of the mechanics and, if I remen the cat was all tore apart and we were little trouble getting help to put it bacl and he was a pretty fussy bird.

In other words, he was really paying t I believe he suggested running a coupl fellows off. We had a case of another s low. He was a very good mechanic on tr mobiles, but as a "cat" mechanic, we fou wasn't.

But we always had the policy to giv chance. At that time I don't believe that and trucks had gotten in on the job. Wel might be a specialist on one line, he m dandy truck mechanic or automobile mec you can't put those fellows on to a D7. [

* * *

LLOYD E. MARTIN

called as a witness by and on behalf of the ent, having been first duly sworn, was exa testified as follows:

Direct Examination

By Mr. Evans:

y of Lloyd E. Martin)
tness: Lloyd E. Martin, 116 Granada
an Francisco.
Mr. Evans): Mr. Martin, by whom are
ved at the [143] present time?
regular, most of the time with R. B.
l Company.

* * *

were the master mechanic on the Modoc
B. Guerin and Company, were you not?
t is right.
you know Mr. Spicher here, who has pre-
tified? [144]
w him on a job.
l, now, did you hire him on the job?
sir.
e you on the job, when he came on?
n't remember whether I was right at the
, when he came on.
l, did you see him when he came on to the

w that first evening, I believe, some time.
, where did you see him?
king on Murien's cat.
else was present at that time, when you
A. I don't remember that.
you have a conversation with him?
n't recall that I did, because I didn't

(Testimony of Lloyd E. Martin)

Q. Did you see the work that he wa
that time?

A. Yes, sir. I checked up on it.

Q. Now, from what you saw there an
that he was doing, would you say that
qualified heavy duty mechanic?

A. Decidedly not.

Q. Did he seem to know what he wa
connection with the work that he was w

A. Some parts you see, he was doin
other parts he showed not to be up to pa

* * *

Q. You were in Court yesterday,
Spicher testified, were you not, regardin
versation with himself and Archibald
union? A. Yes.

Q. Now, will you tell us whether or no
present during that conversation?

A. I was in the shop, I believe. I wa
ent at the time of it.

Q. Did you hear any of the conversatio
Spicher and Archibald?

A. Never heard a word of it. [147]

* * *

Q. Did you ever discharge Mr. Spich

A. No, sir.

Q. Did you ever tell Mr. Spicher that
not use him on the job?

ny of Lloyd E. Martin)
re him and I didn't feel like it was my place
m. [148]

* * *

ow, as the master mechanic on the job, you
ne help, didn't you?
ired some of the help, yes.
as all the help that you hired union help?
ot necessarily, no.

* * *

ans: Answer the question yes or no. [149]
Examiner Frey: What do you mean by
essarily"? No?
Witness: They hired a big percentage of
n help, that the union said they would clear
e had a blanket order that we had, Ed did,
would clear anybody that wanted to work
ecause help was scarce. Back in that dis-
as scarce.
Examiner Frey: Well, was it the under-
that they would join the union later?
Witness: There was nothing said about
the union man would show up every so
l clear those that we had put to work.
Examiner Frey: Did he ever refuse to
body?
itness: Just this one instance.
Examiner Frey: How did you find out
t?

(Testimony of Lloyd E. Martin)

Trial Examiner Frey: Who told yo
office?

The Witness: I believe George Perry t

Trial Examiner Frey: That he refuse
him?

The Witness: That they refused to cl
him.

* * *

Cross-Examination

By Mr. Bamford:

Q. How long have you known Mr. Arch

A. Well, at that time I hadn't know
about thirty days.

Q. Where did you first meet him?

A. I met him sometime in June on the
came up and introduced himself as the
agent. He was working out of Redding. I
work out of San Francisco, and that is th
I hadn't met him.

Q. Could you describe the conversation
with Archibald at that time, please.

A. Well, he come to me and he said, "
man that is not a union man working." An
"Who is he?"

And he told me, and I said, "Well, to th
my knowledge, he is a union man. I didn't
so I don't know. I don't know anything abo

Q. Was he talking about Spicher at th

A. He was talking about Mr. Spicher.

ny of Lloyd E. Martin)
ıd was this the same day that you saw
l and Spicher in conversation later?
elieve it was.
t you are not positive on that, is that cor-
A. I think it was, yes.
is same day? A. This same day.
t you hadn't met Archibald before the day
her left the employ of R. B. Guerin and
?
lon't recall if that was his first trip out on
I got there June the 12th, and I don't re-
her that was his first trip out or not.
rhaps this will refresh your memory, if I
it has been stipulated by counsel that Mr.
eported for work on July 6th and actually
n July 7th and that this conversation be-
chibald and Spicher occurred on July the

; would presumably be on July 8th when
ınd Archibald had this conversation, and
; know if that then was the first day that
ıet Archibald?
lon't recall that I had met him before that
t, that that was his first trip, because I had
here June the 12th, I believe it was, some-
ng in there, and he only made a trip out
ut once a month. [152]
ee. Did Archibald say how he knew that

(Testimony of Lloyd E. Martin)

Q. And you replied, you said, that y
know that he hadn't been a member?

A. I said I didn't know that we had
that wasn't union. That is all I said.

Q. Where did this conversation take

A. I believe it was in Cedarville.

Q. And whereabouts in Cedarville?

A. Down at the shop.

Q. And——

A. Or near the shop. Somewhere arou

Q. Do you remember what time of t
was? A. I wouldn't recall that.

Q. Well, how soon did it occur before
Archibald and Spicher talking?

A. Oh, I would judge a couple of hou
something like that.

Q. And it was at the shop that this t
is that correct?

A. Down near the shop, I would say
remember whether it was in the shop
where. [153]

* * *

Q. Well, what was the usual procedure
ing these men?

A. Well, Red Hester said to put an
work that looked like they would make a g

Q. That was Archibald's boss?

A. That was Archibald's boss.

ıy of Lloyd E. Martin)
go to work and give them a chance. And
lways been Mr. Guerin's attitude also, to
e breaks to anybody like that.
t it was part of the understanding, wasn't
ıey would have to get a permit from the
oin the union?
ll, it is customary to sign up in ninety
ıink that the law does say something like
you can work on the job ninety days and
is a union job, so-called union job, then
ıp.
ll, do you think, as you considered this
you think that Spicher ran into trouble
e wasn't a local man and that is why he
et cleared?
wasn't a capable mechanic.
you discuss that with Archibald?
on't recall if I mentioned that or not. I
y remember.
ll, then, how was it that he couldn't get
cause he wasn't a capable mechanic, if you
uss it with [162] Archibald?
ns: If he knows.
Mr. Bamford): If you know, of course.
uldn't say.
any occasion did you hire a man outside
ırea, who wasn't a member of the Engi-

that would fit into that category, is that

A. Well, he was one that you might
He came in from Oregon, which was a lit
away than what we would call local men.

Q. What would you call local men? H
around in Cedarville?

A. Right around the city, so that they
have any housing problems. [163]

* * *

Q. (By Mr. Bamford): Now, wha
mean by "we had a blanket order from

A. Well, Hester came down there
"Help is hard to get, and you pick up an
want and we will clear them." That is wh
in the nature of a blanket order.

Q. That was the agreement between H
the company?

A. That was just a conversation.

Q. Who was there, you and Mr. Gue

A. Yes.

Trial Examiner Frey: Was that the
the arrangement you had in effect at
Spicher came on the job?

The Witness: It had always been t
way.

* * *

Q. (By Mr. Bamford): Now, I belie
tified that you saw Mr. Spicher workin

y of Lloyd E. Martin)
at time of day was this?
ll, he was working there the biggest part
, that first day.
did you stand around and watch him?
ould come by once in a while to check up.
you have occasion to talk to Mr. Spicher
s time?
on't believe I had any conversation with

just watched him work, or did you talk
en?
d no words with Murien. [165]

* * *

v long total do you think that you spent
Spicher work?
l, I didn't have much time to stand
d watch anything. I had to go over the
ead, which was about eight miles and I
ch time except to come by once in a while
up and see how things were going.
Spicher was making mistakes, was he?
l, he wasn't doing the work in what you
a workmanlike manner.
l, could you be a little bit more specific
?
l, the work was not first class.
result or the way he was working or
A. Methods.

(Testimony of Lloyd E. Martin)

A. Well, the manner in which he wo
like a heavy duty mechanic.

Q. But you didn't speak to him about

A. I had nothing——

Q. Or show him how to do it?

A. I didn't say anything to him.

Trial Examiner Frey: Why didn't

The Witness: Well, that was not th
go around and comment on their work.

Trial Examiner Frey. Well, did you
Guerin and [166] Company was paying
pair of this cat?

A. I never was familiar with any of
ness deals. I was merely a mechanic, chie

Trial Examiner Frey: If you see a
doing the job properly along the mechani
which you had the jurisdiction, didn't yo
thing to him about it?

The Witness: If you could see that
green at the work, you wouldn't say anyt
would just disregard it and——

Trial Examiner Frey: And what?

The Witness: Just let it go until so
time.

Trial Examiner Frey: What would y
future time?

The Witness: Well, at the end of t
would say we didn't need him any more.

Trial Examiner Frey: Did you fi

ny of Lloyd E. Martin)
n phases of it that would have been all

Examiner Frey: What phases do you think
do, on your observation of what he was

itness: He would be what you would call
field man, and not a mechanic.
xaminer Frey: What is the difference be-
eld man and a mechanic?
Witness: A field man takes care of the
d [167] work like that, just adjusts power
clutches, minor stuff like that.
Examiner Frey: And what did you base
lusion on?
itness: Well, just different things that he
g.
Examiner Frey: Tell me what they were.
itness: I don't recall what he was doing,

Examiner Frey: You don't recall what he
g?
itness: You know, only just working on

Examiner Frey: What was he doing on the

itness: Well, we were putting final drives
s and links, things like that on there, but I
ow what part he was working on, when I
ing him.

(Testimony of Lloyd E. Martin)

The Witness: Just working on some work that I mentioned.

Trial Examiner Frey: Well, what is it you now to say that the man was not qu work on that cat?

The Witness: Well, I can watch a ma whether he is capable.

Trial Examiner Frey: Well, you wat that day, didn't you?

The Witness: Yes.

Trial Examiner Frey. Now, what is it work that [168] led you to believe that qualified to do the work?

The Witness: Well, I just can't reme particular part that he was working on. It thing about the final drives, I believe.

Trial Examiner Frey: What was he d the final drives?

The Witness: Well, we were putting ne ets on the final drives and just adjusting th and one thing or another.

Trial Examiner Frey: What was wrong about that, do you know?

The Witness: I couldn't really say jus was working on, really. It has just been ago.

Trial Examiner Frey: Did you watch dling his tools?

The Witness: Well, yes, a little.

ny of Lloyd E. Martin)
en or fifteen minutes and then I had to go
laces.
Examiner Frey. Did you stand watching
en minutes?
itness: No, I didn't, not ten minutes at a

Examiner Frey: You just passed by, is

itness: Passed by, more or less, a few

xaminer Frey: Never spoke to him about
as doing? [169]
itness: No, sir, I never talked to him.
Examiner Frey: Well, how was he han-
tools?
itness: Well, I don't recall any certain
ere that would—any workman can look at
orkman and in just a few minutes they can
y know what they are doing or not.
xaminer Frey: Well, can't you describe
was doing which indicated to you that he
alified to do the work or wasn't handling
right?
itness: No, sir, I couldn't recall. It has
ong.
xaminer Frey: All right, proceed. [170]

* * *

ans: For the purpose of the record, I will

Trial Examiner Frey: I think that stood. [172]

* * *

DICK W. SPICHER

recalled as a witness by and on behalf of eral Counsel, having been previously du was examined and testified further as fo

Direct Examination

By Mr. Bamford:

Q. Mr. Spicher, I believe you testified examination that your wife called you at up at Madras and told you that someone from Cedarville about this job, and that your wife to call back, and she reported did call back, and then you went down to Falls, is that correct? A. That is

Q. And while you were at Klamath night, this fellow from Cedarville called that correct? A. That is correct.

Q. And wanted to know when you we down? A. That is right.

Q. Now, who was this fellow that calle know?

A. Well, I don't recall his name. It se like it was Murien.

Q. You are not sure of that?

A. I am not sure of it, no.

Q. Did you know Murien?

y of Dick W. Spicher.)
no. I am not [174] personally acquainted

have never met him? A. No.
our conversation with Murien, did he in-
it was that he had known about you?
he did. [175]

* * *

Mr. Bamford): I believe the last ques-
How did Murien know about you?
l, he knew about me, he remembered me.
ard Ellis, he used to work for him.
ns: What was his name?
ness: I believe his name was Meinard
skinner.
Mr. Bamford): Where did you know

used to work for this Dunne Construction.
say that he was a cat skinner?
skinner.
long did he work for Dunne?
ould say two, two and a half, or three

your knowledge, was he a heavy duty
A. No. He was just an operator.
ieve you testified also that when you re-
work the next day, that you saw Murien,
ect? A. Correct. [176]
t was the conversation between you and

(Testimony of Dick W. Spicher.)

The Witness: Well, Murien said, "W
you been all this time?" [177]

* * *

Q. (By Mr. Bamford): What did yo

A. Well, I don't recall what I replied
to "come in here and get signed up a
work."

Q. Did he recognize you by sight?

A. Yes.

Q. Did you recognize him by sight?

A. Yes, I did.

Q. But you had never met?

A. No, I was never introduced to hi
seen the man.

Q. Do you know what his first name w

A. No, I can't say as I do.

Q. You actually worked only one da
that correct? A. That is correct.

Q. Now, during any time of that da
work in the shop at Cedarville? A.

Q. Will you describe what you did the

A. Well, we worked out on the job. I
that it was around three and half to four
the shop at Cedarville, approximately.

Q. Did you report to the job site or d
port to the shop?

A. I reported to the shop early in the

Q. And what happened at that time?

y of Dick W. Spicher.)
ich you did? A. Which I did.
you work on that cat all day?
I worked on it for a while and then I
ie points on another cat, on a 'dozer?
s that cat near by the first cat?
vas near by the first cat, yes, and I think
s close to noon. Then we went on down
he left hand side of the road, going out of
to the rest of the cats, and put on some
ls.
v did you get down there, further down?
ent down there with the welder and the
ianics.
you walk down or drive down?
e down. They had a pickup.
they picked up your tools?
y picked up my tools and rode on down
of the cats. [179]

* * *

Mr. Bamford): During the day that
d out on the road, did you observe Mr.
tching your work? A. No, sir.
you have any occasion to talk with Mr.
t day? A. I did not.
you at any time you were employed by
in, did you talk with Mr. Guerin, Senior,
pany of Murien?
l not. [181]

Cross-Examination

By Mr. Evans:

Q. Mr. Spicher, you say that Murien "Where have you been?" A. Yes.

Q. And he said, "Well, come on, go t

A. Yes.

Q. He hired you, didn't he? A.

Q. Well, he said, "Come on and go t

A. Well, he took me in the office to ge

Q. And what did he say to the man i when he took you in there?

A. He told the man in the office tha Spicher, the mechanic," and this fellow i —I don't recall his name. I believe they the day I went to work there. He said,

So we got the card and signed me u handed me the card and said, "Sign this. it and gave him the card back.

Q. You knew that Murien was mere contractor on the job, didn't you?

A. No, I didn't.

Q. You know that now, don't you?

A. No. I don't know as I do.

Q. Do you know of your own know he was employed by [182] Guerin and C

A. He was down there at Ed Guerin the job, with a couple of cats. I didn't was subject to Guerin or renting the

ıy of Dick W. Spicher.)
was the one that called you to go down
go to work?
was the one that called me in Klamath
e in town.

* * *

ED. R. GUERIN

s a witness by and on behalf of the Re-
having been first previously sworn, was
and testified as follows:

Direct Examination

vans:

Guerin, who was Mr. Murien?
and a fellow named Cox were sub-con-
ıe clearing on the job.
s he employed by Guerin in any other ca-
ıer than as a sub-contractor? [183]

* * *

Mr. Evans): Was he ever authorized
yone on behalf of Guerin and Company?

ıns: That is all.
xaminer Frey: What kind of a sub-con-
ou have with them?
itness: Well, we had, I believe ninety
clearing and he and Cox "subbed" that
earing.

into a contract with us for a certain amou
of money per acre, under the same spe
that we did for it to the California High
mission.

Trial Examiner Frey: Now, did you
special arrangement with him about th
nance of his cats?

The Witness: Only this one cat. It ca
job in terrible shape and he asked us to c
with our mechanics.

Trial Examiner Frey: With your mec

The Witness: Yes, and we arranged fo
and the necessary parts and everything. W
those and then charged it back against hi
as an offset.

Trial Examiner Frey: And the w
Spicher started [184] to do was on that c
correct?

The Witness: Yes.

Trial Examiner Frey: He was workin
then, working on that cat, is that right?

The Witness: That is right.

I understand now, if I could qualify t
derstand, you understand, we, in turn, wo
what he had coming on his estimate of cl
what labor was performed on his cat.

Trial Examiner Frey: That is right.
what I understood you to say. In other
you took one of your men—in this case, th

ny of Ed. R. Guerin)
natever it was per hour, would be charged
urien, is that correct?
tness: That is right. [185]

* * *

mford: Let the record show that the par-
late that on September 21, 1949, Respond-
an unconditional offer of reinstatement to
Spicher by way of a letter mailed on Sep-
st from San Francisco to Mr. Spicher's
Klamath Falls, Oregon.
ans: Upon the recommendation of Brad-
ls, the Field Examiner of the NLRB.
mford: As amended, the stipulation is
ry.
ans: It is satisfactory to the Respondents.
xaminer Frey: Do both sides now rest?
ans: Respondent rests.
mford: Yes.
Examiner Frey: Does General Counsel

mford: Yes. [187]

* * *

d July 31, 1950.

In the United States Court of Appeal
the Ninth Circuit

NATIONAL LABOR RELATIONS BO
Petit

vs.

ROBERT S. GUERIN, RAYBURN B.
and ED. R. GUERIN, Individually a
Partners, d/b/a R. B. GUERIN
PANY, General Contractors,

Respon

CERTIFICATE OF THE NATIO
LABOR RELATIONS BOARD

The National Labor Relations Board,
its Executive Secretary duly authorized b
102.87, Rules and Regulations of the Natio
Relations Board—Series 6, hereby certifie
documents annexed hereto constitute a fu
curate transcript of the entire record of a
ing had before said Board, entitled, "In t
of Robert S. Guerin, Rayburn B. Guerin a
Guerin, individually and as co-partners, d/
Guerin & Company, General Contractors,
W. Spicher, an individual," the same bei
as Case No. 20-CA-274 before said Board, s
script including the pleadings and testi
evidence upon which the order of the Boa
proceeding was entered, and including also
ings and order of the Board

umerated, said documents attached hereto
ows:
S. Hawkins' (charging party's represent-
ter, addressed to Examining Officer con-
rtinent facts concerning the charge, re-
y 25, 1949.
rder designating Eugene F. Frey Trial
for the National Labor Relations Board,
18, 1950.
enographic transcript of testimony taken
ial Examiner Frey on July 18 and 19,
ther with all exhibits introduced in evi-

ipulation of the parties to correct the rec-
August 8, 1950.
py of Trial Examiner's Intermediate Re-
l September 27, 1950, (annexed to item
order transferring case to the Board
tember 27, 1950, together with affidavit of
d United States Post Office return re-
eof.
spondents' exceptions to the Intermediate
ceived October 17, 1950.
py of Decision and Order issued by the
Labor Relations Board on January 30,
Intermediate Report annexed, together
avit of service and United States Post
rn receipts thereof.
mony Whereof, the Executive Secretary
ional Labor Relations Board, being there-

Relations Board in the city of Washingto
of Columbia, this 22nd day of June, 195

/s/ FRANK M. KLEILER
Executive Secretar

[Seal] NATIONAL LABOR
RELATIONS BOAR

[Endorsed]: No. 12994. United State
Appeals for the Ninth Circuit. National
lations Board, Petitioner, vs. Robert S
Rayburn B. Guerin and Ed R. Guerin, In
and as Co-Partners, Doing Business as R.
& Company, General Contractors, Re
Transcript of Record. Petition for Enfo
Order of the National Labor Relations B

Filed June 27, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appe
Ninth Circuit.

Court of Appeals and Cause.]

ON FOR ENFORCEMENT OF AN OR-
OF THE NATIONAL LABOR RELA-
S BOARD

norable, the Judges of the United States
of Appeals for the Ninth Circuit:

tional Labor Relations Board pursuant to
nal Labor Relations Act, as amended (61
29 U.S.C., Supp. III, Secs, 151 et seq.),
r called the Act, respectfully petitions
for the enforcement of its order against
nts, Robert S. Guerin, Rayburn B. Guerin
. Guerin, individually and as co-partners,
B. Guerin & Company, General Contrac-
h San Francisco, California, their agents
s. The proceeding resulting in said order
upon the records of the Board as "In
of Robert S. Guerin, Rayburn B. Guerin
Guerin, individually and as co-partners,
B. Guerin & Company, General Contrac-
Dick W. Spicher, an individual, Case No.
."

ort of this petition the Board respectfully

spondents are engaged in business in the
California, within this judicial circuit
unfair labor practices occurred. This

(2) Upon all proceedings had in sa
before the Board as more fully shown by
record thereof certified by the Board and
this Court herein, to which reference
made, the Board on January 30, 1951, d
its findings of fact and conclusions of
issued an order directed to the Respond
agents and assigns. The aforesaid orde
as follows:

ORDER[5]

Upon the entire record in the case and
to Section 10 (c) of the National Labor
Act, the National Labor Relations Boa
orders that the Respondents, Robert S
Rayburn B. Guerin and Ed R. Guerin, in
and as co-partners, d/b/a R. B. Guerin &
General Contractors, South San Franci
fornia, their agents and assigns shall:

1. Cease and desist from:

(a) Encouraging membership in
Engineers Local Union No. 3 of th
tional Union of Operating Engineers,
other labor organization of their emp
discharging any of their employees o
inating in any other manner in regar
hire or tenure or employment or an
condition of their employment;

(b) In any other manner interfe

aining, or coercing their employees in the
ise of the right to self-organization, to
, join, or assist labor organizations, to
ain collectively through representatives of
own choosing, to engage in concerted ac-
es for the purpose of collective bargaining
her mutual aid or protection, or to re-
from any or all of such activities, ex-
to the extent that such right may be af-
d by an agreement requiring membership
labor organization as a condition of em-
nent, as authorized in Section 8 (a) (3)
e Act.

e the following affirmative action, which
d finds will effectuate the policies of the

Make whole Dick W. Spicher, in the
ner set forth in the section of the Inter-
ate Report entitled "The remedy," for
oss of pay he may have suffered as a re-
of the Respondents' discrimination against

Upon request, make available to the
nal Labor Relations Board, or its agents,
xamination and copying, all pay roll rec-
social security payment records, time
, personnel records and reports, and all
records necessary to an analysis of the
nt of back pay due under the terms of

any other projects presently operated
copies of the notice attached to the
ate Report and marked Appendix
of said notice, to be furnished by the
Director for the Twentieth Region, s
being duly signed by the Responden
sentative, be posted by the Responde
diately upon receipt thereof and mai
them for sixty (60) consecutive da
after, in conspicuous places, incl
places where notices to employees ar
arily posted. Reasonable steps shall
by the Respondents to insure that sa
are not altered, defaced, or covere
other material;

(d) Notify the Regional Directo
Twentieth Region, in writing, within
days from the date of this Order, w
the Respondents have taken to com
with.

(3) On January 30, 1951, the Board's
and Order was served upon Respondent b
copies thereof postpaid, bearing Governm
by registered mail, to Respondents' couns

---

[6]This notice, however, shall be, and it
amended by striking from line 3 thereof t
"The Recommendations of a Trial Exami
substituting in lieu thereof the words, "A
and Order." In the event that this Ord

ursuant to Section 10 (e) of the National
lations Act, as amended, the Board is
and filing with this Court a transcript
tire record of the proceeding before the
cluding the pleadings, testimony and evi-
dings of fact, conclusions of law, and
he Board.

ore, the Board prays this Honorable Court
use notice of the filing of this petition
cript to be served upon Respondent and
Court take jurisdiction of the proceeding
e questions determined therein and make
upon the pleadings, testimony and evi-
d the proceedings set forth in the tran-
l upon the order made thereupon as set
paragraph (2) hereof, a decree enforcing
said order of the Board, and requiring
nts, their agents and assigns to comply

NATIONAL LABOR
RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

t Washington, D. C., June 22, 1951.

Appendix A

OTICE TO ALL EMPLOYEES

Relations Act, we hereby notify our empl

We Will Not encourage membersl
erating Engineers Local Union No
International Union of Operating
or in any other labor organization
ployees, by discriminatorily discharg
our employees or by discriminatir
other manner in regard to their hire
of employment or any term or co
employment.

We Will Not in any other manne
with, restrain, or coerce our employ
exercise of their right to self organ
form, join, or assist labor organiz
bargain collectively through represe
their own choosing, to engage in othe
activities for the purposes of colle
gaining or other mutual aid or prote
to refrain from any or all of such
except to the extent that such righ
affected by an agreement requiring
ship in a labor organization as a co
employment, as authorized in Section
of the Act.

We Will Make Whole Dick W. S
any loss of pay suffered by him as a
our discrimination against him at o
at Cedarville, Modoc County, Califo

All our employees are free to become

on. We will not discriminate in regard to
r tenure of employment or any term or
of employment against any employee be-
is membership or nonmembership in any
nization.

R. B. GUERIN & COMPANY,
Employer.

.....

By .....,
Representative.

Title

ice must remain posted for 60 days from
ereof, and must not be altered, defaced,
by any other material.

ed]: Filed June 27, 1951.

---

ourt of Appeals and Cause.]

TEMENT OF POINTS RELIED
UPON BY PETITIONER

norable, the Judges of the United States
of Appeals for the Ninth Circuit:
ional Labor Relations Board, Petitioner
nplying with Rule 19 (6) of the Rules of
, files the following statement of points
h it intends to rely in the above-entitled

Statement of Points

1. The Board properly asserted jurisdi
the unfair labor practices involved herein.

2. The Board's findings are supporte
stantial evidence on the record considered a

3. The Board's order is valid and p

Dated at Washington, D. C., this 22r
June, 1951.

/s/ A. NORMAN SOMERS
Assistant General C

NATIONAL LABOR
RELATIONS BOAR

[Endorsed]: Filed June 27, 1951.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of A

To Robert S. Guerin, Rayburn B. Gueri
R. Guerin, individually and as c
d/b/a R. B. Guerin & Co., General Co
P. O. Box 201, South San Franci
Associated General Contractors of

nion of Operating Engineers, 1095 Mar-
., San Francisco, California

t to the provisions of Subdivision (e)
160, U. S. C. A. Title 29 (National Labor
Board Act, Section 10(e)), you and each
hereby notified that on the 27th day of
., a petition of the National Labor Re-
ard for enforcement of its order entered
y 30, 1951, in a proceeding known upon
s of the said Board as

the Matter of Robert S. Guerin, Ray-
3. Guerin and Ed R. Guerin, individually
s co-partners, doing business as R. B.
n & Company, General Contractors, and
W. Spicher, an individual, Case No.
-274,"

ntry of a decree by the United States
Appeals for the Ninth Circuit, was filed
United States Court of Appeals for the
cuit, copy of which said petition is at-
eto.

also notified to appear and move upon,
plead to said petition within ten days
of the service hereof, or in default of
the said Court of Appeals for the Ninth
l enter such decree as it deems just and
the premises.

in the year of our Lord one thousand, nir
and fifty-one.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of A
the Ninth Circuit.

Returns on service of writ attached.

[Endorsed]: Filed July 10, 1951.

No. 13994

United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

R. B. GUERIN, RAYBURN B. GUERIN, AND ED R. GUERIN, INDIVIDUALLY AND AS COPARTNERS, DOING BUSINESS AS R. B. GUERIN & COMPANY, GENERAL CONTRACTORS, RESPONDENTS

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
FREDERICK U. REEL,
GERALD F. KRASSA,
Attorneys,
National Labor Relations Board.

FILED

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Union Starch & Refining Co. v. *N. L. R. B.*, 186 F. 2
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Universal Camera Corp. v. *N. L. R. B.*, 340 U. S. 474
Statutes:
National Labor Relations Act, as amended (61 Stat. 1
U. S. C., Supp. IV, Sec. 151 *et seq.*)
Section 2 (6)
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Section 10 (a)
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Miscellaneous:
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Moore's Federal Practice (2d ed. 1948) Par. 19.07

ıe United States Court of Appeals for the Ninth Circuit

No. 12994

ʏAL LABOR RELATIONS BOARD, PETITIONER

v.

S. GUERIN, RAYBURN B. GUERIN, AND ED R. N, INDIVIDUALLY AND AS COPARTNERS, DOING ESS AS R. B. GUERIN & COMPANY, GENERAL ACTORS, RESPONDENTS

ON FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

ase is before the Court upon the petition of ıonal Labor Relations Board (hereinafter ıe Board) for enforcement of its order 0) issued against respondents on January pursuant to Section 10 (c) of the National elations Act, as amended (61 Stat. 136, 29 Supp. IV, Sec. 151 *et seq.*, hereinafter referred Act.) [1] The Board's decision and order are in 92 NLRB No. 255. This Court has juris-

unfair labor practice in question (the disch
employee Dick Spicher for nonmembership in
organization) occurred in Modoc County, Ca
within this judicial circuit.

STATEMENT OF THE CASE

A. The Board's findings of fact and conclusions

1. The business of the respondents

In July 1949 at the time of the unfair labor
here involved, respondents, general construct
tractors, were principally engaged under contr
the State of California in filling, grading, an
ing 8.1 miles of California State Highway
between Cedarville and Tom's Creek, Modoc
California (R. 21, 57; 65, 76–77).[3] At th
Highway 28 runs in an easterly direction an
the link between the last highway junction
fornia (with United States Highway 395)
highway system of the State of Nevada, the
of which it crosses a few miles east of the st
which respondents worked (R. 21–23, 57;
The portion of the highway on which resp
worked appears to be the main traffic artery
ing northeast California and northwest Nev
23; 76–77). From June 1, 1949, to June 3
respondents' direct out-of-State purchases v

[2] The Board adopted the findings, conclusions, an
mendations of the Trial Examiner with certain addi
modifications (R. 56).

[3] Record references which precede the semicolon a

machinery, partly new, valued at $300,000, for the most part, was manufactured and assembled in States other than California (R. 21–22, 72–76). Upon these facts the Board found respondents were engaged in interstate commerce the jurisdiction of the Board (R. 56–57).

g of Employee Spicher as a man supposedly cleared by the Union

ndents had subcontracted part of the work way 28 to the firm of Muerin and Cox (R. , 131–132). When one of the caterpillar used on the job required overhauling, Muerin spondents to overhaul it at his expense (R. 30; lowever, when Muerin became dissatisfied with k of the mechanic whom respondents had to that job, respondent Ed R. Guerin told find a mechanic satisfactory to him (R. 30;). Muerin thereupon asked Dick W. Spicher, rienced heavy duty mechanic (R. 34; 100–101, who was then working at Madras, to come rville to work on the job (R. 30, 33; 92–93, 26–128). One of respondents' office employees ed Spicher on July 5, 1949, telling him to Cedarville, and expressly advised him that nts had cleared him with Operating Engi- cal Union No. 3 of the International Union ating Engineers, hereinafter called the Union 93, 98–99). At that time respondents' policy ire only men approved by the Union in order

(R. 43, 44; 86–88).

3. The firing of Spicher upon the Union's refusal to clea

After signing papers at respondent's field
July 6, 1949, Spicher actually reported for
respondent's shop on the project on July 7
93–94, 99, 101, 127–130). That day he perform
on various equipment to which Lloyd Martin,
ent's chief mechanic, assigned him, including
caterpillar tractor (R. 31; 129).

When Spicher reported for work the n
July 8, in the morning, Martin told him
back for the evening shift, starting at 3:3
(R. 31; 94). Returning at that time, Spic
met outside the shop by Archibald, the busine
of the Union, who asked whether Spicher
union book and clearance from the Union
102). Spicher replied that he did not have
with him and that he had been cleared
Union through respondents' office (R. 31; 9
By that time Master Mechanic Martin had
of the shop and joined Spicher and Archibald
95, 103). Archibald asked Martin, who was
ber of the Union himself (R. 31; 88), wh
had seen Spicher's clearance. Martin replied
had not (R. 31; 95, 103). Thereupon A
told Spicher: "There is nothing I can do
then," adding that he had men at the Local
for jobs (R. 31; 95, 103–104). Archibald ask
tin whether he could get along without Spic

had power to discharge employees (R. 40; told Spicher "I guess I can't use you, then" nd Archibald went away together (R. 32;

thereupon left the job (R. 32; 96). He only for his work on July 7, 1949 (R. 32). cher had filed a charge against respondents Board, and after some correspondence had tween respondents and the Board's Regional San Francisco,[4] respondents offered Spicher nent on September 21, 1949 (R. 32; 133).

se facts, the Board found that Spicher was d by respondents because of the refusal of n to "clear" him, and that such discharge Section 8 (a) (3) and (1) of the Act (R.

B. The Board's order

ard ordered respondents to cease and desist ouraging membership of their employees in n or any other labor organization by dis- employees or in any other manner discrim- gainst them with regard to hire or conditions yment, and from in any other manner in- with, restraining or coercing their employees ercise of the rights protected by the Act. rely, the order requires respondents to make

eing served with the charge, respondents wrote the gional Office on July 28, 1949, stating their "under- at [they] must employ union members in good stand- willing to become affiliated with a union or else have

September 21, 1949, and to post appropria
(R. 58–60).

ARGUMENT

I

**Respondents are engaged in interstate commerc
Board properly asserted jurisdiction over their o**

In the light of settled authority establishin
repair and maintenance of highways const
gaging in interstate commerce, respondents'
in repairing California Highway No. 28 a
where it necessarily carried traffic between
and Nevada were plainly subject to the juris
the Board. *Overstreet* v. *North Shore C*
U. S. 125, 129–130; *Bennett* v. *Loftis,* 167
(C. A. 4), and cases there cited. An equ
basis for the Board's assertion of jurisdic
be found in respondents' purchases of me
directly from without the State and their
new equipment manufactured and assemble
the State. *N. L. R. B.* v. *Denver Bldg. Co*
U. S. 675, 683–684; *N. L. R. B.* v. *Towsend*
378, 382 (C. A. 9), certiorari denied, 341 U
Respondents' suggestion that the Board sh
declined as a matter of policy to assert ju
here is not well taken, for the Board's juri
policy expressly includes operations such
spondents' (see *Hollow Tree Lumber Co.,*
R. B. No. 113, 26 L. R. R. M. 1543; *Depe*
Co., 92 NLRB No. 36, 27 L. R. R. M. 1057

n, "Providing the Board acts within its
and constitutional power, it is not for the
say when that power should be exercised."
d case, *supra,* 185 F. 2d at 383.

II

al evidence supports the Board's finding that respondents discharged Spicher for nonmembership in the violation of Section 8 (a) (3) and (1) of the Act

idence summarized above (pp. 4–5) establishes
ondents' master mechanic Martin, who had
to discharge employees, was advised by
n that it had not cleared Spicher for em-
, and that Martin thereupon told Spicher,
I can't use you, then."[5] This evidence fully
the Board's finding that respondents dis-
Spicher because he was not "cleared" for
ent by the Union. That a discharge under
cumstances contravenes Section 8 (a) (3)
ll settled to require argument. *N. L. R. B.*
Co., 180 F. 2d 445, 447 (C. A. 9), and cases
ed.[6]

s denial that he made this statement raised a conflict
s testimony and that of Spicher. The Trial Examiner
his reasons for accepting Spicher's version (R. 32, n. 7).
adopted the Trial Examiner's credibility findings. See
Camera Corp. v. *N. L. R. B.*, 340 U. S. 474, 488.
s no contention that respondents had a valid union
greement permitting discharge for nonmembership in
(R. 42–43). Moreover, no such contract could lawfully
discharge of a newly hired employee within 30 days
ate of hiring, and even after that period discharge could
required only for nonpayment of union dues and initia-

Spicher was hired by mistake, that he was not
to do the work, and that he left the job of
accord either because he discovered he coul
the work,[7] or because of some compulsion
Union. In rejecting these contentions the T
aminer and the Board relied not only u
credited testimony as to the circumstances of S
termination (*supra,* pp. 4–5) but also upon
mony that he had talked to Muerin about
before he was hired (R. 33; 127), upon the
any credible evidence that he was not qual
33–34; 121–125), and upon respondent Ed R.
admission that respondents would not retain
ployees not "cleared" by the Union (R. 35–40
In addition to the grounds expressed by th
for rejecting respondents' contentions, it may
that the contentions as to "mistaken identi
want of qualifications are palpable after
which respondents not only failed to advance
letter to the Board written 3 weeks after S
discharge (see *supra,* note 4), but which ar
sistent with the reasons there stated. Moreo
in the letter and in his testimony, responde
Guerin did not rely upon the simple allega
Spicher had quit but instead explained his ter
in the light of the Union's economic pressu
respondents. It is, of course, beyond disp

[7] Respondents nowhere explain the contradictio
Spicher's returning to his job twice on July 8 (*supra*

ision of economic hardship is not an excuse for
; the Act. *N. L. R. B.* v. *Star Publishing Co.*,
465, 470 (C. A. 9); *N. L. R. B.* v. *Graham*,
d 787, 788 (C. A. 9); *N. L. L. B.* v. *Gluek*
Co., 144 F. 2d 847, 853–854 (C. A. 8), and
re cited.

Board's finding that respondents discharged
because of the Union's refusal to "clear" him
loyment is therefore supported not only by
ited testimony of the dischargee, but by the
respondents' contentions upon analysis actu-
her support the Board's finding. Since this
inding of fact is thus supported by substantial
on the record considered as a whole, it follows
Board properly concluded that Spicher's
e violated Section 8 (a) (3).

III

e Board's procedure was valid and proper

ndents contended that the entire proceeding
e dismissed because the Board in its com-
ad not joined the Union and the Associated
Contractors of America ("AGC") [8] as parties
nt. If this objection were well taken the
ould be powerless to remedy the unfair labor
in this case, for the scheme of the National
elations Act is such that no person can be
party respondent who has not been named in

dents belonged to AGC, which had a contract recog-
Union as exclusive bargaining representative. The

a charge, and no charge was filed against
AGC or the Union. However, the objectio
be devoid of merit even in private litigatio
so all the more in the light of the public
protected by the administrative proceeding
Board.

Neither the AGC nor the Union were "ne
parties in the accepted sense that their part
was necessary in order to adjudicate the en
troversy. Had they been "necessary" part
non-joinder would still be excusable because a
ment that these parties, not named in any c
joined would have deprived the Board of ju
to proceed in the case. Cf. Federal Rules
Procedure, Rule 19 (b). Since the contro
tween the Board and the respondent comp
not extend to AGC and the Union, and

[9] Pursuant to Section 10 (b), "the Board * * *
power to issue * * * a complaint" "whenever it
that any person has engaged * * * in any * *
labor practice." See *N. L. R. B.* v. *Hopwood Retinnin*
98 F. 2d 97, 102 (C. A. 2). This statutory scheme ha
in cases of discriminatory discharges caused by union
in proceedings against the employer alone like the p
also in proceedings against the union alone. See *e. g*
Union of Marine Cooks and Stewards, C. I. O., Decemb
92 N. L. R. B. No. 147, 27 L. R. R. M. 1172; *Pen and Pe*
ers, Local 19,593, October 10, 1950, 91 N. L. R. B. N
L. R. R. M. 1583; *International Union, United Automo*
ers, Local 291, December 27, 1950, 92 N. L. R. B. N
L. R. R. M. 1188; *International Heat and Frost Insu*
Asbestos Workers, Local 7, AFL, December 21, 1950, 92
134, 27 L. R. R. M. 1154. In those cases the Board o

ation by the Board does not affect, or inter-
h, any legal right of these entities, they are,
e, not "indispensable" parties. "If the case
completely decided, as between the litigant
the circumstance that an interest exists in
her person, whom the process of the court
reach, * * * ought not to prevent a decree
s merits." *Elmendorf* v. *Taylor,* 10 Wheat.
7–168, as quoted by Mr. Justice Curtis in
v. *Barrow,* 17 How. 130, 142; Moore's Federal
(2d ed. 1948) Par. 19.07.[10]

ese circumstances [11] it is unnecessary to inquire
extent the traditional rules on compulsory
of parties apply to Board proceedings. Suf-
refer to the statement of the Supreme Court
a proceeding so narrowly restricted to the
on and enforcement of public rights, there is
ope or need for the traditional rules govern-

the Union been joined as a party and found to have
he Act, respondents would have been jointly and sev-
ble with the Union. *Union Starch & Refining Co.* v.
., 186 F. 2d 1008, 1013–1014 (C. A. 7), certiorari denied,
, 1951. By analogy to the law governing joint tort-
follows that the Union was not an indispensable party.
sors are not indispensable or necessary to an action
ne of their number, because their liability is both joint
al". Moore's Federal Practice (2d ed. 1948) Par. 19.07;
Nat. Bank v. *Johnson*, 251 U. S. 68, 84; *Mason* v.
n, 82 Fed. 689, 690 (C. A. 7).

ondent's objection to the nonjoinder of the AGC was
oviated by the Board's declaration that, unlike the Trial
, it did "not predicate [its] findings herein on any evi-
ating to the organization and functions of The Asso-

private rights." *National Licorice Co.* v. *N. L*
309 U. S. 350, 363. See also *N. L. R. B.* v.
& Michigan Electric Co., 124 F. 2d 50, 53–55
6), and cases there discussed, affirmed with
cussion of this point, 318 U. S. 9.

CONCLUSION

It is respectfully submitted that the Board p
assumed jurisdiction of this case, that its find
supported by substantial evidence on the rec
sidered as a whole, that its order is valid a
a decree should issue enforcing the order in
prayed in the Board's petition.

GEORGE J. BOTT,
General Counse
DAVID P. FINDLING,
Associate General Counse
A. NORMAN SOMERS,
Assistant General Counse
FREDERICK U. REEL,
GERALD F. KRASSA,
Attorney
National Labor Relations B

NOVEMBER 1951.

APPENDIX

velant provisions of the National Labor Act, as amended, in effect at the times relevant 61 Stat. 136, U. S C. Supp. IV, Sec. 151, e as follows:

DEFINITIONS

. 2. When used in this Act—

* * * * *

6) The term "commerce" means trade, ffic, commerce, transportation, or communiion among the several States, or between District of Columbia or any Territory of United States and any State or other rritory, or between any foreign country and State, Territory, or the District of umbia, or within the District of Columbia or Territory, or between points in the same te but through any other State or any rritory or the District of Columbia or any eign country.

7) The term "affecting commerce" means commerce, or burdening or obstructing comrce or the free flow of commerce, or having or tending to lead to a labor dispute burding or obstructing commerce or the free w of commerce.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to f-organization, to form, join, or assist labor anizations, to bargain collectively through resentatives of their own choosing, and to gage in other concerted activities for the rpose of collective bargaining or other tual aid or protection, and shall also have right to refrain from any or all of such

may be affected by an agreement
membership in a labor organization a
tion of employment as authorized i
8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unf
practice for an employer—

(1) To interfere with, restrain,
employees in the exercise of th
guaranteed in Section 7;

* * * *

(3) By discrimination in regard t
tenure of employment or any term or
of employment to encourage or d
membership in any labor organizat
vided, That nothing in this Act, or in
statute of the United States, shall
an employer from making an agree
a labor organization (not establish
tained, or assisted by any action
Section 8 (a) of this Act as an un
practice) to require as a condition o
ment membership therein on or
thirtieth day following the beginnin
employment or the effective date of s
ment, whichever is the later, (i) if
organization is the representative o
ployees as provided in Section 9 (a
appropriate collective-bargaining un
by such agreement when made; an
following the most recent election
provided in Section 9 (e) the Bo
have certified that at least a major
employees eligible to vote in such ele
voted to authorize such labor organ
make such an agreement: *Provided*
That no employer shall justify any d

) was not available to the employee on the
e terms and conditions generally applicable
other members, or (B) if he has reasonable
unds for believing that membership was
ied or terminated for reasons other than
failure of the employee to tender the
iodic dues and the initiation fees uniformly
uired as a condition of acquiring or
aining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

EC. 10. (a) The Board is empowered, as here-
fter provided, to prevent any person from
aging in any unfair labor practice (listed
Section 8) affecting commerce. This power
ll not be affected by any other means of
ustment or prevention that has been or may
established by agreement, law, or other-
e. * * *

c) * * * If upon the preponderance of
testimony taken the Board shall be of the
nion that any person named in the complaint
engaged in or is engaging in any such
air labor practice, then the Board shall state
findings of fact and shall issue and cause
e served on such person an order requiring
n person to cease and desist from such un-
labor practice, and to take such affirmative
on including reinstatement of employees
n or without back pay, as will effectuate the
cies of this Act * * *.

e) The Board shall have power to petition
circuit court of appeals of the United States
cluding the United States Court of Appeals
the District of Columbia), or if all the
uit courts of appeals to which application
be made are in vacation, any district court

spectively, wherein the unfair labor
in question occurred or wherein such
resides or transacts business, for the
ment of such order and for appropr
porary relief or restraining order,
certify and file in the court a transcr
entire record in the proceedings, incl
pleadings and testimony upon which s
was entered and the findings and ord
Board. Upon such filing, the court s
notice thereof to be served upon suc
and thereupon shall have jurisdictio
proceeding and of the question d
therein, and shall have power to g
temporary relief or restraining or
deems just and proper, and to make
upon the pleadings, testimony, and pr
set forth in such transcript a decree
modifying, and enforcing as so mo
setting aside in whole or in part the
the Board. No objection that has
urged before the Board, its member,
agency, shall be considered by the co
the failure or neglect to urge such
shall be excused because of extraord
cumstances. The findings of the B
respect to questions of fact if support
stantial evidence on the record consi
whole shall be conclusive. * * *

In the

ed States Court of Appeals

FOR THE [illegible] CIRCUIT

L. Toor,

Appellant,

vs.

[illegible] Westover,

Appellee.

E. Toor and Florence D. Toor,

Appellants,

vs.

[illegible] Westover,

Appellee.

APPELLANTS' OPENING BRIEF.

Fink, Rolston, Levinthal & Kent,
6253 Hollywood Boulevard,
Los Angeles 28, California,

Leo V. Silverstein,
837 Van Nuys Building,
Los Angeles 14, California,

Schwartz, Gage & Bloom,
6253 Hollywood Boulevard,

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I.

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II.

A proper application of the principles, governing the
nation of the validity of a partnership, to the fact
lished by the record, indicates that the conclusion
trial court as to the validity of the partnership is
to law .....

A. The following principles of law govern the det
tion of the validity of the partnership in the
case .....

(1) If a partnership exists under commercial
exists for tax purposes—the tests are th
The ultimate question is whether the par
was a sham or whether there was a real i
carry on the business as a partnership.....

(2) There is no different test to be applied i
mining the validity of a family partnership
applied in testing the validity of a partnersl
strangers .....

(3) There is no distinction between limited
ships and general partnerships for income t
poses, and limited partnerships are recogni
tax purposes .....

(4) A partnership is an organization for the
tion of income to which each partner cor
one or both of the ingredients of income-
or services .....

(5) Neither original capital nor services are n
requisites to the validity of a partnership,
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7) The desire to reduce taxes will not defeat the validity of a transaction so long as the transaction is bona fide and is not entered into for the sole motive of saving taxes..... 48

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D. The same government accepted the donee's retur
shortly after the creation of the trusts on an irre
basis; the same government, in renegotiating w
tracts, demanded and received some $60,000 base
a recognition of the partnership and its fisc
which could not otherwise have been assessed
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Conclusion .....

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IN THE

d States Court of Appeals

FOR THE NINTH CIRCUIT

E. TOOR,

Appellant,

vs.

WESTOVER,

Appellee.

E. TOOR and FLORENCE D. TOOR,

Appellants,

vs.

WESTOVER,

Appellee.

APPELLANTS' OPENING BRIEF.

Jurisdiction.

peal involves federal income taxes for the cal-
s 1943, 1944 and 1945 of appellants Herbert E.
Florence D. Toor. The taxes in dispute with
Mr. Toor for those years, amounting to a total
99.29, were paid by Mr. Toor on or about No-
5, 1948, under protest after additional assess-
been made by the Commissioner of Internal
R. 7, 9, 14, 17, 22, 25]. Claims for refund were

for the recovery of the alleged overpayment [
Substantially similar assessments were made to
by Florence D. Toor the wife of Herbert E. To
similar action was brought against the Collect
ternal Revenue on account thereof by Herbert
and Florence D. Toor. The two cases involved
issues and were consolidated for hearing before
trict Court. It was stipulated between counse
decision on appeal in the first case, bearing Dist
No. 10461-Y should be applied to and be decisi
appeal from the second case bearing District C
10462-Y (p. 515). Jurisdiction was conferre
District Court by 28 U. S. C. A. Sec. 1340.
were entered on January 11, 1951 (pp. 80-81).
for a new trial were duly filed by plaintiffs on
22, 1951, and orders denying such motions were
February 6, 1951. On April 5, 1951, notices
were filed [R. 82-84] pursuant to the provisio
U. S. C. A. Sec. 1291.

Statement of the Case.

The complaints in the two actions sought the
amounts paid with interest, as the result of
assessments on the income tax of plaintiffs Mr.
Toor, for the years 1943, 1944 and 1945. The
assessments were based first upon the asserti
partnership known as Furniture Guild of Calif
ganized on November 20, 1942, and in which
was general partner, and the Beverly Hills Nati
and Trust Company as trustee of two trusts, t

s was the disallowance of certain deductions
Mr. and Mrs. Toor. However, there is no ap-
this aspect of the case.

Mrs. Toor were divorced in 1948, and as part
perty settlement agreement, it was provided that
would be entitled to receive and retain as his
roperty any income tax refunds, credits or tax
r the years in question [R. 191].

cases were consolidated for trial and the case
he tax paid by Mrs. Toor (Case No. 10462-Y)
tted and decided on the basis of the testimony
involving the tax paid by Mr. Toor (Case No.
[R. 499]. For purposes of argument, we will
ases as one.

l court ruled that the partnership was not valid
rposes and that the Commissioner of Internal
roperly assessed to the plaintiffs the entire in-
e business upon a community basis.

Presented:

ether the limited partnership should have been
for tax purposes for the years 1943, 1944 and

second question is presented in the event the
stion is answered in the affirmative. The trus-
rustee intended to create an irrevocable trust.
by reason of a clerical error, the irrevocability
s inadvertently omitted from the original trust
ts creating the trusts for the children on No-
1942. The parties confirmed this original in-

of correction of the error, and if the later date whether the income taxes of Mr. and Mrs. Toor affected. This question arising as a result of th error, was not ruled upon by the trial court sin answered the first question in the negative.

Statement of Facts.

(Page references are to the printed record

The appellants, Herbert E. Toor and Florence were married in 1926. Domestic difficulties betw developed prior to 1941, and in that year they live together as husband and wife although they to live under the same roof [R. 96]. Their culminated in a divorce in 1948 [R. 95]. T source of difficulty was the lack of sense of valu ness or money on the part of Mrs. Toor and t thrift manner in which she disposed of money [

Because of this difficulty, Mr. Toor in 1941, make provision for their two children, Barbara and Bruce Alan Toor by changing at least one policy to make them direct beneficiaries, and United States bonds monthly in their name [R. early 1942, the situation had crystallized to the po Mr. Toor discussed with his attorney, Max Finl which to get some of the community property control of Mrs. Toor and himself so that th would have some measure of protection in the domestic situation erupted, or in the event somet pened to Mr. Toor. A trust was the natur

) so as not to expire until after the children were ge and would come into the property themselves By the terms of the trust agreements all funds accumulated in the trusts and there could be no n until the trusts terminated, which was after en became of age. In discussing the trusts, it suggested that if a separate trustee were ap- e might be able to invest those funds in Mr. siness which was then conducted as a sole pro-) under the name of Furniture Guild of Cali- . 98].

was adopted for the setting up of a trust for Mr. Fink talked to the Beverly Hills National Trust Company, and that bank agreed to accept eship. Arrangements were also made for the of a limited partnership of the furniture busi- the bank, as trustee of both trusts, being the rtner [R. 104]. Prior thereto, Mr. Toor had cquainted with the bank or its officers except by ; it was not he who suggested the bank as . 286-287].

he program had been arrived at and tentative ents made with the bank, Mr. Fink and Mr. Toor with a tax consultant and certified public ac- concerning the tax aspects thereof [R. 103-104].

of the trust agreements were drawn in July or f 1942 [R. 298]. After negotiations with the some revisions in the trusts resulting therefrom, rust papers were drawn. These were signed on 20, 1942 by the bank and by Mr. and Mrs.

trusts. $10,500 went into each of the two tru
child, Barbara, was then about twelve years old
other, Bruce, was then about eight years old.
same day, Mr. Toor and the Beverly Hills Natio
and Trust Company executed articles of limited
ship and a verified sworn certificate of limited
ship, which documents were first drafted some t
the original drafts of the trust agreements we
[R. 115-127, 299, 232].

In connection with the trusts, the bank in its
as trustee, filed donee gift tax returns with both
eral government and with the State of Califor
the basis of irrevocable trusts [R. 332-334].

The certificate of limited partnership was file
corded, a certificate of fictitious firm name publ
commercial agencies and the bank with which
ness had its account were notified, insurance poli
changed, premises for the operation of the busi
leased to the partnership by Mr. Toor, employme
ments were executed by the partnership, partners
were set up, and in general, all acts connected
setting up of the business as a partnership were
137-160].

In accordance with the partnership agreement,
transmitted to the new partnership the sum o
as a capital investment for each of the two tru
Toor conveyed to the partnership by bill of sale

each contributed $10,000, making a total capi-
for the partnership of $60,000.

terms of the limited partnership agreement, Mr.
to receive reasonable compensation for his serv-
, after consultation with the bank, was fixed at
oss sales [R. 290, 338, 364, 367]. It was also
by the partnership agreement that profits should
and distributed in proportion to the investments
to each of the trusts, and four-sixths to Mr.
hat Mr. Toor should have full charge and con-
e partnership business and have full power to
all acts necessary or convenient with respect to
rship business that a general partner in a limited
ip could do in accordance with the laws relating
partnerships. The term of the partnership was
il June, 1955; Mr. Toor had the power to ter-
e partnership by giving thirty days' prior written
which event he could purchase the interests of
d partners at book value. Assets had also been
at book value for the purpose of commencing
ership. Proper partnership books were to be
statements were to be prepared annually or more
30-40].

rtnership agreement also provided that the part-
would be retroactive to September 1, 1942. The
r this was that it was originally contemplated

of the partnership was not accomplished until N
20, 1942. This retroactive feature in the agreen
subsequently eliminated by an amendment to the
so that the agreement and action thereunder wo
form to the true situation, and that income earne
the partnership took effect, would not be credite
partnership [R. 315-316, 388, 405-407].

All business thereafter was conducted in the
the partnership [R. 169-172]. The partnership
a fiscal year ending June 30th of each year. Bo
set up and kept on a partnership basis [R. 388-39
The books accurately and honestly reflected ever
action during the life of the partnership; entries v
quate to disclose the relationship of the partners
transactions in the books were in the name of the
ship; there were no subterfuges or kickbacks of
[R. 388-396, 443-445]. The terms of the limited
ship agreement were in all respects adhered to. M
received a reasonable compensation for his servic
upon three percent of gross sales, which comp
was deducted before the computation of net pr
162, 338].

Mr. Toor managed the business as a general
Accountings were rendered to the bank [R. 19
Profits were divided and substantial distributions
proportion to the investments [R. 339-353].

oor, and $21,443.60 to each trust. On or about
10, 1944, $60,000 of the profits were distrib-
,000 to Mr. Toor and $10,000 to each of the
. 339, 343, 344].

e year ending June 30, 1944, the total net profits
artnership, after deducting Mr. Toor's salary,
,380.38, of which sum $91,586.92 was credited
oor's capital account, and the sum of $22,896.37
ital account of each of the trusts. On February
$60,000 was distributed, $40,000 to Mr. Toor
00 to each of the trusts [R. 346-347].

e year ending June 30, 1945, the total net profits
usiness after deducting Mr. Toor's salary was
.65, of which $66,932.43 was credited to the
count of Mr. Toor, and $16,733.11 to the capital
of each of the trusts. On September 6, 1945,
was distributed, of which $20,000 was distrib-
Mr. Toor and $5,000 to each of the trusts [R.

s funds in the hands of the trustee were invested
e to time in accordance with the trustee's discre-
344-350].

, 1946, the partnership distributed securities hav-
st to the partnership of $211,724.03, of which
.61 worth of securities were distributed to Mr.
$36,489.21 worth of securities to each of the

666.66 worth of assets were distributed to Mr. T
$16,666.67 worth of assets was distributed to ea
trusts. Concurrently therewith a corporation wa
to carry on the business of the partnership in
of "Furniture Guild of California, Inc.," capit
$100,000 and each of the partners contributed to
poration their respective shares of the assets of
nership, other than the securities distributed to t
stock in the corporation. The balance of the
the partnership, consisting of cash, was distri
each of the partners in proportion on or about Ju
at which time the partnership was terminated
352, 389-395; Ex. 25].

At the time of trial Mr. Toor's son-in-law wa
associated in the business and Mr. Toor stated
and thought the partnership arrangement wo
bring his son into the business [R. 190, 480-481]

The government has disregarded the partnersh
fiscal years for income tax purposes, and has as
additional tax liability against Herbert E. Toor
ence D. Toor based upon the portion of the pro
the partnership received by the two trusts for
years ending June 30, 1943, June 30, 1944 and
1945 respectively.

The facts relating to the issue of the effect of t
error in the execution of the original trust in

CATIONS OF ERRORS:

hat the Court erred in concluding that the parties orm and carry on as a partnership, within the of the Internal Revenue Code, the business the Furniture Guild of California [Conclusions to 6].

he Court erred in making the following findings

he plaintiff, as manager of the marital community entered into two trust agreements [Finding is was erroneous in that the trust agreements ered into by Mr. and Mrs. Toor and funds con- trust were conveyed by both.

he Bank as trustee executed articles of limited ip for sharing in profits [Finding 11]. This neous because the partnership was created for the of the business and contemplated, among other e sharing of profits.

he trustee was authorized to invest only in the of which plaintiff was a partner or principal er, or in government bonds [Finding 13]. This neous in that the trustee also had the power, in iscretion, to invest part or all of the funds in he securities of the United States or the instru- s or states thereof.

was erroneous in that written confirmation of the intention to create irrevocable trusts was executed cember 14, 1943.

(e) Under the articles of partnership, plaintiff full charge and control of the entire business, full power and authority to do any act necessary venient with respect to the business [Finding 16 was erroneous in that the control, power and was limited to partnership purposes only, and was limited by the express terms of the partnership a and by the provisions of law regarding limited ships.

(f) The creation of the limited partnership in did not in any way change the control which the exercised over the business [Finding 19]. This roneous in that the financial structure and ope the business was changed and plaintiff's control ited by the provisions of the written partnersh ment, by the provisions of law regarding limited ships and by his fiduciary duties as a general par

(g) The creation and the termination of the ship subsequent to the taxable years were merel of the plaintiff [Finding 20]. This was erroneo the partnership was created and terminated in a with the voluntary agreement and independent of the parties.

l of plaintiff's property on which the business
ed on—in brief, the determination of all matters
judgment or management, control of the prop-
disposition and allocation of funds derived from
ess, including amounts to be allocated each year,
exclusively under the domination of the plaintiff
ll intents and purposes, the creation of the part-
ıade no change whatever in the manner in which
ıess had been conducted before [Finding 21].
erroneous in that the control by the plaintiff was
than that of a general partner in a limited part-
ınd was exercised under the limitations and re-
of the written agreement and of the law, and
fiduciary capacity as a general partner, as dis-
d from control for his own benefit only.

ɔ instance appears where the Bank or its repre-
; used independent judgment, and the trustee ex-
ɔne of the rights of partnership, even by way of
Finding 22]. This was erroneous in that the
use independent judgment, did enforce the writ-
ement, did recognize all of its rights as limited
and, under the circumstances, acted in a manner
ɔuld be expected of a limited partner in a part-
omposed of strangers.

ıe trustee did not exercise dominion and control
trust corpus in the business and did not influence

in the business, and influenced the conduct of the
ship, and enforced the partnership agreement.

(k) To the extent that capital played a part in
ings of the business, the plaintiff must still be c
to have created the entire business income becau
control over corpus and income and his retenti
many of the attributes of ownership of the tru
in his business [Finding 24]. This was erroneou
the control of plaintiff was that of a general p
a limited partnership and the earnings of the
were created by the business conducted as a pa
plaintiff received a salary as compensation for his
and the bank did contribute capital in proporti
participation in profits to a business which requ
stantial risk capital for its operation.

(l) The entire effect of the establishment of
nership was merely to permit the children of the
to receive a certain amount of the income when
tiff determined that the income was subject to di
rather than diversion to other business determine
[Finding 25]. This was erroneous in that the i
the partnership went into the trusts; all distribut
required by agreement to be and were proport
the ownership of the business; the discretion to
portion of the income in the business was not an
discretion and was a normal and necessary disc

he plaintiff and the trustee did not act with a purpose in setting up the limited partnership 26]. This was erroneous in that there was a purpose" as that phrase is properly used; there lity of intent and a complete absence of sham or e.

ne plaintiff and the trustee did not in good faith join together in the present conduct of the busi- prise [Finding 27]. This was erroneous in that circumstances and evidence both direct and in- wed a good faith intent to join in the conduct of rise as limited partners.

nat the Court erred in failing to find on all the factual issues presented. These factual issues under Point IB of the Argument.

nat the Court erred in ruling, in effect, that the determining the validity of a family partnership urposes are different from the tests for determin- alidity of such a partnership in ordinary cases ving taxes.

he Court erred in ruling in effect, that a family artnership is not valid for tax purposes if no nt capital or services are contributed by the lim- ners.

SUMMARY OF ARGUMENT.

I. There is no evidence to support the findin
on which the Court's conclusion as to the invalid
partnership is based.

A. The pertinent findings of fact are
ported by the evidence.

(1) Both direct and indirect evidence
good faith intention to form and carry on
ness as a partnership.

(2) The control of the business given
in the agreement was not complete for all p
it was for partnership purposes only, was
law, and by the agreement, and were th
normally granted a general partner in a lim
nership.

(3) The control exercised by Mr. T
changed by the creation of the partnershi
from the complete freedom of the individua
tor to the fiduciary position of general pa
limitations and responsibilities imposed by
ment and by law. This fiduciary obligatio
ognized and respected at all times by the
their conduct.

(4) The partnership was both created a
nated by voluntary agreement of the parti
at arm's length and using independent jud

(5) The bank as trustee did use indepen
ment, availed itself of its rights as a limite

available to it that it was called upon to exercise,
l to act as would be expected under the cir-
ances if this were a limited partnership with
gers.

Mr. Toor's personal services and skill played
portant role in the earning of the business in-
but he received a salary for such services which
ot unreasonable. The capital and organization
e business itself was the major factor in the
ng of the income of the business, and as one-
owners of that capital and organiaztion, each
e trusts must be considered to have earned one-
of the income of the business over and above
Toor's salary.

The provision that Mr. Toor might determine
mes and amounts of distribution of income, did
ve him an arbitrary discretion, but one that had
used reasonably for the benefit of the business.
a common, normal and accepted function of
gement to determine when and how much of
come of the business is to be distributed.

The words "business purpose" should not be
reted to require a benefit to the business. As
rly interpreted, there was a business purpose
e formation of the partnership; there was no
or subterfuge or paper organization; there was
intent to form a partnership and carry on the
ess as such.

The Court failed to find on all the material is-

Court's ruling that the partnership was invali
purposes, is contrary to law.

A. Principles of law applicable:

(1) If a partnership exists under comm
it exists for tax purposes—the tests are the

(2) No different test is applied in deter
validity of a family partnership than
strangers.

(3) No distinction is made between ge
limited partnerships for the tax question
volved.

(4) A partnership is an organization fo
duction of income to which each partner c
capital or services.

(5) Neither original capital nor service
quired for the validity of the partnership.

(6) The desire of a parent to provide fo
dren is a legitimate motive for creating t
partnerships.

(7) The desire to reduce taxes will not
validity of a transaction if that is not the sc
and if the transaction is *bona fide*.

B. Other family partnership cases.

C. An evaluation of the facts of the in
in the light of the above stated principl

he clerical error in omitting the irrevocability
m the original trust instruments did not result
income from the partnership to be attributed
ıd Mrs. Toor or justify the disregard of the
of the partnership for tax purposes.

The facts indicate a true intent that the trusts
evocable from the beginning, to wit: November
942, and that the documents originally signed
ıot contain the irrevocability clause all of the
s believed that they did contain.

The instruments executed December 14, 1943
rmed the original intention of the parties that
rusts be irrevocable and, in any event, should
nsidered to be retroactive to the date the error
red.

Even if the reformatory instruments were not
ıctive in effect, the clerical error was corrected
e the close of the taxable year of the trusts and
r. and Mrs. Toor, and the income from the part-
ip accruing to the trusts in that year is not
ıle to Mr. and Mrs. Toor.

The same government accepted the donee's re-
made shortly after the creation of the trusts, on
revocable basis; the same government, in rene-
ting war contracts, demanded and received some

ARGUMENT.

I.

There Is No Evidence to Support the Fir Fact From Which Was Drawn the Tria Conclusion That the Plaintiff Did Not I Carry on the Business in Question as a ship Within the Meaning of the Internal Code.

A. THE PERTINENT FINDINGS OF FACT A SUPPORTED BY THE EVIDENCE.

(1) Finding 27.

"The plaintiff and the trustee did not in g intend to join together in the present condu business enterprise."

This finding itself is a conclusion drawn by from the other findings of fact [Findings 16, affecting this issue since there is no direct evide ever to support it. The only direct evidence on was that plaintiff and the trustee did in good fa to join together for the present conduct of the enterprise [R. 98, 201, 336-337, 374-376, 484-4

Thus, for example, Mr. Brooks, the represe the trustee bank, who conducted the negotiation in answer to the Court's questions, as follows [R

"The Court: Was there any understand time that you entered into this agreement

e Court: In other words, you understood that, ct to the limited rights you had in the partner- you were actually entering into this partnership, r as those particular trusts were concerned?

e Witness: That is correct.

e Court: And you were to derive whatever its came to the trusts?

e Witness: That is correct. In a fiduciary ity."

cord is quite clear that there was no understand- than the agreement executed by the parties in , dealing at arm's length and using independent and carried out by them to the last letter. s no agreement between Mr. Toor and his chil- rding the disposition of the trust fund at the on of the trusts [R. 201] and it was not even that the bank was a party to any covert agree-

disputed and uncontradicted testimony of un- l persons may not arbitrarily be disregarded by finder. (*Lawton v. Commissioner* (6th Cir.), 380.)

ll hereinafter further point out in detail that in- concerns all of the indirect evidence from which of the parties may be inferred there is no evi- support a finding that the partnership here con-

(2) Finding 16.

"Under the articles of partnership, plaintif
full charge and control of the entire bus
had full power and authority to do any act
or convenient with respect to the business.'

This finding is not justified by the evidence.
dence shows that as a general partner, Mr. Too
charge and control of the business for *partner*
poses only. Likewise, he had full power and
to do any act necessary or convenient with resp
business *only for partnership purposes.* We s
inafter discuss the distinction between the powe
agement for personal purposes as compared
power of management in a representative or
capacity for the benefit of others. In this case,
was given for the benefit of the partnership of
trusts were part owners. Such powers could no
arbitrarily. As a matter of fact the powers giv
agreement were what a general partner would h
out the agreement.

(3) Findings 19 and 21.

"19. The creation of the limited partn
this case did not in any way change the cont
the plaintiff exercised over the business.

"21. The control of the business incom
manner of its allocation, the salaries to be
by the plaintiff and the employees, the amo
paid for the rental of plaintiff's property
the business was carried on—in brief, the d

the domination of the plaintiff that, to all in- and purposes, the creation of the partnership no change whatever in the manner in which the ess had been conducted before."

indings are also without support in the record. findings are basically similar, the same evidence scussed in connection with both of them.

ese findings first of all ignore the fact that the a general partner in a limited partnership does m that of an individual proprietor. The control Toor previously had as an individual proprietor limited by his fiduciary obligations as a partner e specific limitations prescribed by law (see Secs. d 15510 of the Corporations Code of California the Appendix hereto). The limitations enunci- e statute are not meaningless.

ese findings also ignore the fact that the control was given and exercised was simply that of a artner in an ordinary limited partnership. Find- hen analyzed, merely amounts to a finding that ess was conducted as a limited partnership Toor having the powers of management of a artner. There is nothing in this that could sup- nclusion that the partnership was not a real one was invalid for tax purposes, unless a limited ip created with gift capital could not be recog- tax purposes. As hereinafter pointed out, this is w. It is extremely significant that neither this or any other finding states that Mr. Toor was

(c) These findings further ignore the diffe
tween control primarily for his own benefit, and
trol exercisable for the benefit of others—in this
the benefit of the partnership of which the trusts
third owners.

See:

Armstrong v. Commissioner (10th Cir., 1
F. 2d 700, and cases cited therein at p.

Greenberger v. Commissioner (7th Cir., 1
F. 2d 990;

Cf. Thomas v. Feldman (5th Cir., 1946
2d 488, aff'd in *Feldman v. Thomas,* 34
R. 1631.

Whatever powers of management Mr. Toor ha
eral partner, he could not exercise them for his
advantage, but had to act for the benefit of the pa
with a proportionate part of the gains going to t
partners. He was neither the beneficial owne
corpus nor the recipient of income therefrom.

(d) These findings further ignore the evidenc
business was at all times conducted as a true a
partnership, which evidence also demonstrated
parties truly intended to enter into the partner
bona fide business relationship.

(1) A written agreement was executed; a b

books were set up and properly kept according
usiness practice for a limited partnership, etc.
60, 338-396, 439, 443]. As far as everyone was
, the business was operated as a partnership [R.

here is no evidence that Mr. Toor ever did any-
lerogation of the agreement or of the rights of
l partners.

countings were regularly furnished the bank;
l distribution of profits were made; Mr. Toor
with the bank as to his compensation and kept
informed of the conduct of the business [R. 194,
364, 367, 339-353, 294].

rticularly significant was the conduct of the
the handling of the renegotiation problem which
h respect to sales made to the United States
ing the taxable years in question. A change in
gotiation Act of 1943 increased the amount of
from negotiation for the fiscal year ending
1943, of persons, firms or corporations whose
ar ended after June 30, 1943. Since the partner-
al year ended June 30, 1943, it could not take
of this increased exemption. If the partnership
in effect, Mr. Toor could have taken advantage
creased exemption since his taxable year ended
31. When confronted with this problem, Mr.

resulted in the requirement that the partnersh
a substantial sum to the government.

(5) There was no mere paper allocation of i
indicated in the case of *Commissioner v. Tower,*
280, 66 Sup. Ct. 532, 91 L. Ed. 670, 164 A. L.
There were no rebates or kickbacks from the i
the partnership allocated to the trusts, none of it
for the benefit of the trustors nor was it available
The income was not used to help support the ch
189). All distributions were made in proportion
ership (pp. 339, 353). The full ownership of t
invested in the partnership and the income there
at all times in the trustee. All benefits accrui
trusts actually went into the trusts. In this re
trial court commented as follows [R. 500]:

> "I will say this for you: I intimated a p
> finding of fact on one point, and I will in
> you another prospective finding of fact, wh
> your advantage, and that is this: that the
> shows clearly that the estate, the partne
> spected at all times the rights and interes
> trusts, and at no time was there any atten
> prive these children of the benefits coming t
>
> The only thing that may appear in the
> far is the fact there may be undistribu
> which, of course, it is within the right of a
> ship or corporation to distribute at a partic
> In that respect we do not have a paper org
> If it were paper it would have accumulated
> good money of the United States in the tru
> of those children over this period of years.

(4) Finding 20.

he creation and the termination of the partner-
subsequent to the taxable years were merely the
of the plaintiff."

was no evidence to justify such a finding. The
rtnership was created by a valid and voluntary
t between Mr. Toor and the Beverly Hills
Bank and Trust Company, for a valuable con-
. The consent of each party was freely and vol-
given not only to the creation but also to the
on of the partnership. The bank investigated
and his business prior to becoming a limited
and gave the matter the same consideration as
in making any other investment as a trustee
rust [R. 336, 337, 374]. The terms of the trust
ts and partnership agreement were worked out
he parties, the bank requiring provisions therein
ry to it and refusing to accept the documents in
as proposed originally by Mr. Toor's attorney.
had not dealt with the bank or even met its
ior to negotiating with them for the trusts and
ip. [R. 304, 286-287].

nk was also consulted and its agreement was re-
nd obtained for the termination of the partner-
e distribution of the assets and investment in the
on which succeeded to the business of the part-
The bank did not feel compelled to make the in-
in the successor corporation, and considered the

(5) Findings 22 and 23.

"22. No instance appears where the Ba representatives used independent judgment gested any action other than that propose plaintiff. The trustee exercised none of t of partnership even by way of advice.

"23. The trustee did not exercise dom control over the trust corpus in the busines not influence the conduct of the partnersh disposition of its income."

Both of these findings are refuted by the same The evidence shows that the bank realized th actually entering into the partnership and that derive whatever benefits came to the trusts fro eration of the business [R. 376]. After the of the partnership, Mr. Toor kept the bank inf the conduct of the business and consulted with officers from time to time [R. 194, 294]. The cussed with Mr. Toor the fixing of Mr. Toor's sation [R. 290, 338, 364, 367].

The bank received the annual accountings, them and felt satisfied. [R. 194, 338, 368, 375- bank received its proportionate share of all dis [R. 339-353].

It was recognized that under the limited pa laws of the State of California, the limited par not be active in the management and control of ness. (California Corporations Code, Sec. 15 bank recognized that it had rights under the

nvestigation of the honesty, integrity and com-
f Mr. Toor, and certainly nothing thereafter
that any further investigation was necessary.
felt, based upon the reports that it received,
ity of Mr. Toor and the obvious success of the
that the management of the business was in
ls, that the trusts were getting everything due
none of their rights were in any way violated
368, 374-376]. This particular issue was sum-
by the questions of the Court itself at the con-
the testimony of Mr. Brooks [R. 375-376]:

he Court: Just one question. At all times you
felt and known that you have certain rights as
ited partner, whether they are defined in the in-
nent or whether they are defined by law?

ne Witness: I did. We recognized that.

ne Court: You recognized that?

ne Witness: Yes.

ne Court: You have not exercised those rights
use you have not felt called upon to exercise
?

ne Witness: That is correct.

ne Court: You felt all the time, in relation to
business, the integrity of Mr. Toor, the reports
received, that the management was in safe hands
nothing was going on that would warrant your
king that the trusts were being deprived of what
coming to them, or that any of the assets of the
nership had been diverted to channels not auth-
d by the agreement or by law? Is that not
?

of any limited partner who was a stranger. unusual to have a limited partner with very lit edge of the business. In this case, the business standingly successful, the limited partners we everything they were entitled to and it was ob none of their rights were being violated. It wo expected that the limited partner, even if a would attempt to impose his judgment on that o eral partner even by way of advice.

Even if the bank had done nothing, to say tha had not influenced the conduct of the partnersl disposition of its income is somewhat like sayi contract does not influence the conduct of t because there are no breaches of the contract an based thereon; it is also akin to saying that a not influence or affect the actions of the peop to it because there are no violations and no pr therefor.

(6) Finding 24.

> "The nature of the business was such plaintiff's personal services, business judgr skill played an important role in the earni business income. But to the extent that cap a part, because of his control over corpus a and his retention of so many of the att ownership of the trust corpus in his bus plaintiff must still be considered to have c entire business income."

Mr. Toor's personal services were, of cours tant to the business since he was the sole genera

ultation with the bank. There is no finding alary was unreasonable. With respect to this e note the following:

r. Toor received as salary, $11,972.83 for the th period from November 20, 1942 to June 30, 138.22 for the fiscal year 1944, and $20,579.47 cal year 1945. [Ex. O; R. 162, 393].

r. Toor and Mr. Brooks testified the salary was [R. 161-162, 290, 338].

or the years 1937-1940, Mr. Toor derived from ss an average annual earning of $14,164, which oth compensation for his personal efforts and . 339].

r. Toor testified that on that same percentage robably would have made $25,000 per year for le years in question, had it not been for the nt work they were doing [R. 276-277].

r. Toor had previously managed another s an employee with his compensation based on 3% of gross sales [R. 161]. Mr. Toor also e could have obtained a competent executive to his duties for the same rate of compensation

he salary was fixed in 1942 when the amounts y Mr. Toor by reason thereof were considered compensation for such an executive in an ordi- nercial venture.

he business was not a one-man business, nor a

was ten or eleven salesmen. In addition, there w
hundred or more production workers plus su
employees and office staff [R. 163]. There was
manager, Mr. Coyle, who was a sort of general
in addition to supervising the office, he took c
great many things including purchasing and su
of sales when Mr. Toor was not there. There
a production manager, Mr. Parker, who was in
charge of production and production employees
were also foremen in charge of each division of
[R. 164].

Mr. Toor was away from Los Angeles frequ
ing this period on various trips. While he was a
Coyle and Mr. Parker operated the business [R.
Mr. Coyle and Mr. Parker in salary and bo
earned $10,000 a year [R. 167]. Important
were generally arrived at after a conference
other executives [R. 290-291, 216-217, 238, 2

The major income producing factor during th
was the organization, inventory and equipment
partnership owned and paid for. This was pa
true during the war years when the increase in
business and profits realized was due to pur
the United States Navy. These purchases wer
sults of making acceptable bids and being able t
to meet the orders. The figures for the bids we
worked out by Mr. Coyle and Mr. Parker alth
Toor would pass on them. Once the bids were
and orders received, it would be largely a

upon analyzing this finding, we find that it is
e conclusion as to the ultimate result reached.
no finding as to the extent of control or that
was any greater than would be the case of a
rtner in a limited partnership with strangers.
his finding thus uses the end result itself (the
ion of the invalidity of the partnership) as the
arriving at the result, and skips over the in-
and necessary determination of the reality of
to carry on as a partnership. Thus, this find-
ence says: Although income must be taxed to
rns it, we are going to disregard the fact that
was paid a reasonable salary for his services
e him with earning all of the income of the
p business because the partnership is invalid
rposes; now, since Mr. Toor must be considered
all of the partnership business earnings, and
me must be taxed to he who earns it, obviously
rship is invalid for tax purposes. It is sub-
t this is the only logical analysis of the finding
pointed out, it is not the law that the control
nd exercised by a general partner in a limited
p is sufficient to render the partnership invalid
urposes or make the income chargeable to the
rtner merely because a family relationship ex-

: *Lamb v. Smith,* 3rd Cir. 1950, 183 F. 2d
938;

eenberger v. Commissioner, 7th Cir. 1949, 177

Flandrick v. U. S. (Dist. Ct. So. Calif. 1951), cited in Prentice Hall Par. 725

Cf. Harris v. Commissioner, 9th Cir. 19 2d 444 (rev'g 10 T. C. 818).

In this connection the Court in *Greenberger v. sioner, supra,* at p. 994 commented:

"It is true the court in Tower stated, at page 289, 66 S. Ct. at page 537, 'The iss earned the income,' but the court also st issue depends on whether this husband really intended to carry on business as a pa If the partnership in the instant case was as we think it was, the income earned was t partnership and not that of petitioner. titioner undoubtedly was the predominating the conduct and management of the bus Commissioner overlooks the fact that the ship paid him a salary of $45,000 per annu each of the taxable years for his services t ered."

(7) Finding 25.

"The entire effect of the establishmen partnership was merely to permit the child plaintiff to receive a certain amount of t when the plaintiff determined that the in subject to distribution rather than diversio business determined by him."

This finding, as is indicated by its own lan merely a conclusion. It is respectfully submitte

up to in all respects; it disregards the fact that
s intended to form a partnership and carry on
ss as such, and that they did so; it disregards
hat the control over the business and income
y Mr. Toor was different under the partnership
s as an individual proprietor; it disregards the
he income was not under the sole control of Mr.
would be if he were the sole owner of the busi-
could only use it for business purposes which
portionately benefit the limited partners, and he
distribute it unless proportionate distribution
to the limited partners. Furthermore, though
nd amount of distribution of profits was at Mr.
cretion, this was not an arbitrary discretion, if
tion was exercised arbitrarily, the bank as a
rtner had an appropriate remedy in the courts
Limited Partnership Law.

e: *Greenberger v. Commissioner,* (7 Cir. 1949)
177 F. 2d 990, 993.

t that the finding was intended to be limited to
that Mr. Toor could determine the amounts and
distributions of profits. Here again, we have
provision which in no way would tend to sup-
conclusion that the partnership was sham.

lained by Mr. Toor, there are times when the
e best plowed back into new equipment or ex-
nd there are other times when the profits can be
l; certainly it is the management of the business
uld determine, from the point of view of the

such as we have here, whether it be corporate
wise, to retain substantial reserves from pr
business purposes, the amount of which will v
time to time, and which amounts are left to the
of such management. As a matter of fact, Mr.
plained that the provision was taken from a for
ited partnership agreement that he was generally
that time [R. 323].

We note that it was particularly important
the management have the determination of v
how much of the profits to distribute. The bus
in the process of expansion; due to war condi
ventories had been substantially reduced and res
to be set up to cover increased inventory req
when normal times returned; large capital dema
be necessitated by sudden government orders, t
of which could not be anticipated; that the nc
and downs of the furniture business were cor
exaggerated by the uncertainty of war conditi
note further that before the partnership was c
Mr. Toor had left much of the profits in the
substantially restricting his drawings [R. 411,
165, 497].

Furthermore, Mr. Toor could not derive any
benefit from allowing profits to remain in the
other than the gain he would share with the lim
ners from the resulting benefits to the busir
could not use the funds for personal purposes a
would have no motive for leaving the funds in

efit to the business in permitting profits to re-
ein, it was to the advantage of the trusts that
one rather than having the trusts invest these
government securities at a much smaller re-
pointed out by the Trial Court, the fact that
did not accumulate idle funds was an indica-
the partnership was *not* a paper organization

(8) Finding 26.

he plaintiff and the trustee did not act with a
ess purpose in setting up the limited partner-
"

e Trial Court misinterpreted "business pur-
requiring a business benefit.

Culbertson opinion, the ultimate question to be
the family partnership cases was stated to be
'the parties in good faith *and* acting with a
urpose intended to join together in the present
f the enterprise." (Emphasis added.) The
rt, in this finding, has evidently accepted the
nt's contention that a business purpose, as thus
ns a benefit to the business. Such interpreta-
oneous. To thus interpret the phrase would be
ntrary to the substance of the *Culbertson* ruling,
d make one factor, the absence of a business
nclusive. It is submitted that the words "busi-
se" as used in the *Culbertson* opinion may logi-
terpreted only as referring to the reality of the
arry on the basis as a partnership, and to share

Thus, in the case of *Commissioner v. Tower,* 3
280, 66 S. Ct. 532, 90 L. Ed. 670, 164 A. L.
the Court used these words:

> "When the existence of a limited partne
> rangement is challenged by outsiders, the
> arises whether the partners really and truly
> to join together *for the purpose of carrying*
> *ness and sharing in the profits or losses*
> (Emphasis added.)

It was this statement which the Supreme Cou
Culbertson case, was reaffirming when it used th
in question.

Accordingly, in a subsequent portion of the *C*
opinion, we find the following language (337 U
69 Sup. Ct. 1215):

> "If, upon a consideration of all the facts, it
> that the partners joined together in good
> conduct a business, having agreed that the
> or capital to be contributed presently by ea
> such value to the partnership that the co
> should participate in the distribution of pro
> *is sufficient.*" (Emphasis added.)

This is the interpretation taken by the Appella
in applying the *Culbertson* decision. Thus, in
Commissioner of Internal Revenue (6th Cir., 19
F. 2d 246, 254, it is stated:

> "The test, of course, is not whether there
> or obligation on the part of a business man
> his wife and children partners in his bus

rtnerships, cannot be recognized for tax pur-
re there was no contribution of original capital
s. This is not the law.

mb v. Smith (3rd Cir., 1950), 183 F. 2d 938;
eenberger v. Commissioner, 177 F. 2d 990;
eodore T. Stern, 15 T. C. 521;
n A. Morris v. Commissioner, 13 T. C. 1020;
ndrick v. United States (Dist. Ct. So. Calif.,
May 15, 1951), cited in Prentice Hall, Par.
72515.

e also *Harris v. Commissioner* (9th Cir.), 175
(rev'g 10 T. C. 818), where the Circuit Court
he Tax Court which had held a family partner-
lid, the children contributing neither original
r services. The case was remanded for further
ion in conformity with the *Culbertson* case. If
s benefit were a vital requirement, the Circuit
that case could readily have affirmed the Tax

properly interpreted, the evidence demonstrates
s purpose in that there was a reality of intent
ne partnership and carry on the business as such.
) We have already commented upon the conduct
ne business as a true partnership as indicating
eality of the intent of the parties. In addition,

tributed to the trustee without any strings
Mr. Toor received a salary for his services;
trol was circumscribed by law and by his
character as general partner; his relationsh
corpus of the trusts in the partnership an
come therefrom was changed—he could nc
it or avail himself of it for his own purpos

(2) The prime moving purpose in the cr
the trusts was not a mere tax saving devi
prime initiating factor was the desire to m
rate, independent provision for the childr
result of Mr. Toor's domestic difficulties
spendthrift habits of his wife. It was onl
that the trust invest in Mr. Toor's busine
was a successful one. Naturally, as the pr
gressed, the tax aspects were considered.
tax advantage would accrue was certainl
unwelcome *additional* benefit to be derived
plan. It is settled that the desire to reduc
taxes will not defeat the validity of the tr
so long as it is not entered into for the sol
of saving taxes.

Chisholm v. Commissioner, 79 F. 2d 14;
Ramsey v. Curry (Dist. Ct., Iowa), 88 F
967.

(3) Additional factors indicating the real
intent of the parties:

(a) Mr. Toor had previously operated the
as a limited partnership in 1935 with his

tion of the partnership for a contribution of
0 plus a promise of $2500 more [R. 93, Ex. 1].

) Mr. Toor had previously made gifts to his
ren and subsequent to the formation of the part-
ip continued to make substantial gifts [R. 190].

) In the creation of the partnership, Mr. Toor
definitely depriving himself of that portion of
ncome derived from the business which belonged
e trusts. This was a substantial practical de-
tion in this case. Mr. Toor was a comparatively
g man; his future needs might be very substan-
nd not adequately taken care of by his earnings;
as not a wealthy man, having severly restricted
mount of his drawings and his manner of living
at he could let the profits ride and develop the
ess [R. 93, 96, 165]. He did not have adequate
ves so that he could feel secure that he would
n the future need the corpus or income belong-
o the trusts. Furthermore, the corpus and in-
of the trusts would go to the children when
became of age regardless of the situation that
t develop between himself and the children dur-
he interim. Thus, for example, he would have
ay of preventing the children from turning back
y to Mrs. Toor after they became of age [R.
. We note in addition that the partnership was
ed during the early part of the war when busi-
conditions and future prospects were particularly
rtain. The government orders were about to

B. THE COURT ERRED IN FAILING TO F ALL THE MATERIAL ISSUES PRESENT

The evidence as heretofore discussed in detail, that all the following facts should have been fou Court. Each of these facts are material to the determination of the reality of the partnership without contradiction in the record:

(1) That the limited partnership agreer entered into in accordance with the laws of of California and in accordance with the exp visions of formal documents.

(2) That the trustee at all times after into the partnership agreement owned an i the business and exercised rights of owner respect thereto, including receipts of princip come therefrom, the receipt and examination ments of operation, and advising with th partner.

(3) As a general partner, Herbert E. full charge and control of the entire bus partnership purposes only; the Bank was at entitled to exercise the attributes of owne the rights of a limited partner with respe partnership business and its assets, and to r proportionate share of profits as fixed by t

) That the business was at all times in question
ted as a limited partnership, and in accordance
the partnership agreement.

) That the contribution of capital played an
rtant role in the earning of the business income;
the Bank contributed $20,000 in capital and
ert E. Toor contributed $40,000 of the total
al of $60,000; that the sharing of profits was
oportion to the capital contribution.

) That in addition to his proportionate share of
profits, Herbert E. Toor received a substantial
y for his services to the business, which salary
not unreasonable.

) That the partnership effected a substantial
ge in the economic relation of plaintiffs and their
ren to the income in question.

) That Herbert E. Toor neither had the power
r ever made a distribution of profits to himself
out making a proportionate distribution to the
s.

) The partnership and all parties at all times
cted the rights and interests of the trusts, and
time was there any attempt to deprive the trusts
e children of the benefits coming to them. None
e parties ever did anything in derogation of the

(10) Once the partnership was establish
the benefits that could go into the trusts actu
into the trusts.

(11) Neither of the plaintiffs could or d
from the income earned by and attributed to t

(12) There was no understanding that
and partnership agreements were not to b
out in strict accordance with the provisions
there is no evidence of bad faith on the pa
of the parties.

(13) The parties intended to join togethe
on a business and share in the profits and
partners.

(14) That the partners joined together
faith to conduct a business, having agreed
capital to be contributed presently by each i
value to the partnership that the contribut
participate in the distribution of profits.

II.

r Application of the Principles, Governing Determination of the Validity of a Partner- to the Facts Established by the Record, ates That the Conclusion of the Trial Court the Validity of the Partnership Is Contrary aw.

FOLLOWING PRINCIPLES OF LAW GOVERN DETERMINATION OF THE VALIDITY OF PARTNERSHIP IN THE INSTANT CASE.

artnership Exists Under Commercial Law, It Exists x Purposes—the Tests Are the Same. The Ultimate on Is Whether the Partnership Was a Sham or ıer There Was a Real Intent to Carry on the Busi- s a Partnership.

mmissioner v. Tower (1946), 327 U. S. 280, 66 Sup. Ct. 532, 90 L. Ed. 670, 164 A. L. R. 1135;

mmissioner v. Culbertson (1949), 337 U. S. 733, 69 Sup. Ct. 1210, 93 L. Ed. 1659;

ısburg v. Arnold (5th Cir., 1950), 185 F. 2d 913.

connection, we note particularly the following in the concurring opinion of Mr. Justice Frank- the *Culbertson* case (337 U. S. 753, 69 Sup. Ct.

seems to me important, therefore, to make

a virtue that they have not for the sake of tax men and women may appear in a guise v gimlet eye of the tax court is entitled to pie should leave no doubt in the minds of the T: of the Courts of Appeals, of the Treasur the bar that the essential holding of the To is that there is 'no reason' why the 'genera which the existence of a partnership is d 'should not apply in tax cases where the go challenges the existence of a partnership for poses.' "

In further referring to the *Tower* case, M Frankfurter also states (337 U. S. 750, 69 Sup. C

"In short, the opinion did not say that fa nerships are not to be regarded as partner income-tax purposes even though they be commercial partnerships; the opinion did announce hobbling presumptions under the tax law against such partnerships."

It is submitted that the ordinary commercial of the validity of a partnership are clearly met stant case.

(2) There Is No Different Test to Be Applied in ing the Validity of a Family Partnership Than in Testing the Validity of a Partnership With

As stated in the *Culbertson* case, the "existen family relationship does not create a status wh determines tax questions, but is simply a war things may not be what they seem."

Code so as virtually to ban partnerships com-
of the members of an intimate family group."
phasis added.)

ıbmitted that the Trial Court here has taken a
ip that would have been held valid if composed
ers, and ruled in effect that it was sham because
nposed of the members of a family group.

Is No Distinction Between Limited Partnerships
eneral Partnerships for Income Tax Purposes, and
d Partnerships Are Recognized for Tax Purposes.

eenberger v. Commissioner (7th Cir., 1949),
177 F. 2d 990;

mb v. Smith (3rd Cir., 1950), 183 F. 2d 938.

o Regulations 111, Sec. 29.3797.5 (providing a
ırtnership is classified as a general partnership
ırposes).

tnership Is an Organization for the Production of
e to Which Each Partner Contributes One or Both
Ingredients of Income—Capital or Services.

mmissioner of Internal Revenue v. Culbertson,
supra.

er Original Capital nor Services Are Necessary
sites to the Validity of a Partnership, the True Test
the Reality of Intent to Carry on the Business as

(6) **The Desire of a Parent to Provide for His C a Lawful and Legitimate Motive for Creating T Partnerships.**

Armstrong v. Commissioner (10th Cir 143 F. 2d 700;

Thomas v. Feldman (5th Cir., 1946), 1 488.

(7) **The Desire to Reduce Taxes Will Not Defeat th of a Transaction so Long as the Transaction Fide and Is Not Entered Into for the Sole Saving Taxes.**

Chisholm v. Commissioner, 79 F. 2d 14.

B. OTHER FAMILY PARTNERSHIP CA

It would serve little purpose to review at l many cases applying the principles set out in the *son* case. However, we respectfully invite th attention to the case of *Greenberger v. Commissi* Cir., 1949), 177 F. 2d 990. The facts in that comparable and the observations in the opinion ticularly pertinent to the facts of the instant cas

In that case, the taxpayer was the main stock a corporation which derived practically all of i from commissions earned on sales. Prior to th years in question, the taxpayer made a valid gi of the corporation stock to his wife, and later the and his wife created irrevocable trusts for the

as formed with the taxpayer as general partner
vife and the trusts as limited partners. Con-
pital was $10,000. Profits for the years in ques-
$139,000 and $140,000 respectively. The Com-
attacked the validity of the partnership and the
t found that no valid partnership existed for
purposes. The Seventh Circuit Court reversed
Court and found that a valid partnership did

x Court had found that capital was not a mate-
e producing factor in the operation of the busi-
this respect, the Seventh Circuit Court observed
s true that the capital invested in the partnership
pective parties was not large, but the point was
had decided it was sufficient for the needs of
ss in connection with the available income which
rship had. The Tax Court had also found that
nd the trustees did not perform any services for
ess. The Appellate Court observed that the
of the lack of services and the fact that capital
material income producing factor, indicated at
ror in emphasis, and that the predominant factor
ood faith and legitimate purpose of the parties
g the partnership.

espect to the government's contention that the
by the rendition of personal services, was re-

the business as a partnership. If the partne
bona fide the income earned was that of the p
and not that of the taxpayer. *The Appellate C*
pointed out that while the taxpayer was undou
predominant force in the conduct and managem
business, the Commissioner had overlooked the
the partnership paid him a salary for his ser
dered during the taxable years.

The Appellate Court also distinguished the *T*
Lusthaus decisions by pointing out that in th
there was a mere paper allocation of income, w
the case in question, the parents retained no
or control over the property donated and the inc
the trust property had been received and invest
respective trustees in accordance with their tru
tions. It was also stated in this connection that
no doubt could have successfully maintained
against the taxpayer to recover their part of th
ship income had he attempted to take or receive
own. Further, it was observed that a curious
would be presented if the taxpayer were requi
count for and pay a tax upon income which h
right to receive and which right existed solely
clusively in the trusts. Accordingly it was held
conclusion of the Tax Court that no valid p
existed for federal income tax purposes was wi

APPLICATION OF THE ABOVE STATED CIPLES OF LAW TO THE FOLLOWING CIR-TANCES IN THIS CASE WHICH ARE WITH-CONTRADICTION IN THE RECORD, COM-THE CONCLUSION IN THIS CASE THAT E WAS A REAL INTENT TO CARRY ON THE NESS AS A PARTNERSHIP.

r. Toor had operated the same business as a rtnership with his father-in-law as a limited ack in 1935.

e prime motive for the trusts and the limited p was something other than tax saving; the as to make effective provision for the children possible benefit to Mr. and Mrs. Toor.

e bank and its personnel were strangers to and dealt at arm's length with him, the bank s own decisions based on its own investigations. s no evidence that the bank was a mere tool oor.

e partnership agreement was properly executed respects and to all intents and purposes was nited partnership agreement in accordance with ne business was set up and conducted as a part-

e economic relation of the parties were changed or's position as a general partner was substan-erent from that of sole proprietor

(b) Accountings had to be rendered.

(c) He was subject to the limitations gations imposed by law for limited partner the bank had corresponding rights and pow

(d) Income earned in the business by irrevocably belonged to them, and Mr. T not use it for personal purposes.

(e) Mr. Toor could not make a distri profits to himself without making a pro distribution to the trusts.

(f) The business involved a risk of loss gain, and losses would be shared in prop the extent of the capital investment; profits no means assured at that time.

(6) The business was conducted in accorda the agreement, and Mr. Toor respected the respo and obligations imposed upon him.

(7) Capital and the existing organization at were the major factors in the production of in the trusts had paid for and owned their pro share therein. To the extent Mr. Toor's se counted for income, he was specially compen such services by a reasonable salary in additi share of the profits. This salary was not fou unreasonable and all of the evidence showed

ly over what Mr. Toor had been making for
y and profits for the years prior to the war; a
executive could have been obtained to perform
functions for the same rate of compensation;
was fixed in 1942 when, in an ordinary com-
nture, the amounts received by Mr. Toor would
considered adequate compensation for a com-
cutive; the business ran without Mr. Toor be-
a good part of the time; the large profits were
e result of the war years and having available
, equipment and organization for the production

e bank at all times observed its duties as trustee
cted the interests of the trusts as limited part-

) The bank reviewed the reports received, was
ied thereby, was satisfied as to the integrity and
ct of Mr. Toor and was kept informed by him
the conduct of the business.

) The bank was at all times aware of its rights
limited partner.

) There is no instance in the record where the
was lax in its duties or failed to take any ac-
hat would normally be expected from a limited
er, if this were a partnership with strangers.

suspicion, interference, investigation, crit
for that matter, even the tendering of ad
limited partner not experienced in the busi

(e) There is no evidence that the ban
fully intend to live up to its duties as trus
protect the interests of the limited partners

(9) Once the partnership was established,
benefits that could go to the trusts actually wer
trusts. There were no rebates, kickbacks or an
of a mere paper allocation.

(10) Neither Mr. Toor nor Mrs. Toor cou
benefit from the income earned by the trusts.
the income was used to satisfy their obligation
or otherwise used for their benefit.

(11) There is no evidence in any respect of
on the part of any of the parties.

(12) The parties did join together in good
conduct the business, and agreed that the cap
contributed by each was of such value to the p
that the contributors should participate proporti
the distribution of profits.

III.

rical Error in Omitting the Irrevocability se From the Trust Instruments Did Not Re- in Causing Income From the Partnership to Attributed to Mr. and Mrs. Toor or Justify Disregard of the Fiscal Year of the Partner- for Tax Purposes.

st note that the argument under this point as- partnership is found to be valid. Furthermore, ie involved under this point of the argument is ated to the partnership for the fiscal year end- 30, 1943.

A. THE FACTS.

idence was without contradiction that it was intended by all parties concerned that the trusts be irrevocable, and it was understood by the iereof that the Declarations of Trust so stated. ssity that the trusts be irrevocable was discussed and Mrs. Toor by their attorney, Max Fink, t with their approval. Mr. Toor was also spe- dvised by a certified public accountant to make irrevocable. The matter of irrevocability was ussed with the bank. The first drafts of the ruments contained an irrevocability clause, and parties noted that clause in those drafts. The s went through several draft stages, and in the

trust documents were executed with all of th
under the impression that they contained the irre
clause. [R. 99, 100, 113, 296-306, 320-323,
Exs. 18 and 19].

That there was any question as to irrevoca
first discovered when the bank received a let
September 29, 1943, from the State of Californ
troller's Office, pointing out that there was pr
inadvertent omission of the usual irrevocabili
This letter was in reference to the gift tax ret
mitted to the State of California with the tru
ments as supporting documents. The letter w
mitted to Mr. Fink, who considered what actio
in order to correct the error, and consulted oth
it. Reformation by lawsuit or by agreement
sidered, and the latter course was finally chosen
336, 306-309, 324-326, 174-180, Exs. 20 and
instruments dated December 14, 1943, which w
ized by the bank on January 13, 1944, it was
and confirmed by the trustees and by Mr. and
that it was the original intention of the partie
trust instruments be irrevocable and that tho
ments were irrevocable [Ex. 14, R. 176-180].

The above facts are not in dispute. The onl
is when the trusts should be deemed irrevocable

INTENTION OF THE PARTIES ALWAYS THAT THE TRUSTS BE IRREVOCABLE AND TRUSTS SHOULD BE VIEWED ACCORDY. THE REFORMATORY INSTRUMENTS OF MBER 14, 1943, IN ANY EVENT, SHOULD BE IDERED TO BE RETROACTIVE TO THE WHEN THE CLERICAL ERROR OCCURRED.

ne error was a mere inadvertent clerical one is spute. The documents were not the ones the tended to execute. The money was delivered nk and accepted by it irrevocably. This is not n such as was presented in *Gaylord v. Commis*th Cir., 1946), 153 F. 2d 408, where the docu the one the taxpayer intended to sign, but be a mistake as to its legal effect, it failed to his later claimed "intention" and "desire."

role evidence rule, as well as special statutory on thereof has its well established exceptions rough mistake, accident or imperfection in the he written document does not contain the true ng of the parties.

lifornia Code of Civil Procedure, Section 1856; *lifornia Civil Code,* Section 1640.

t mentioned section provides that:

When, through fraud, mistake, or accident, a writ ontract fails to express the real intention of the

Contracts may be revised or reformed to reflec
agreement of the parties, notwithstanding th
States government is a party, and notwithstandi
quirements of statute or the Statute of Frauds.

See:

Ackerlind v. United States, 240 U. S. 53
Ct. 438, 60 L. Ed. 78, and cases cited

So, too, in tax cases a taxpayer is not conclusiv
for tax consequences by a written contract whi
executed, where such contract does not reflect
situation.

See:

Arthur R. Jones Syndicate v. Commissi
Cir., 1927), 23 F. 2d 833.

This right to correct a mistake applies to an
defect in a written contract whether it is in re
common law or statutory requisite.

45 Am. Jur. 601;

22 Cal. Jur. 709.

A contract may be reformed by adding an omi
lation.

Fresno Canal & Irrigation Co. v. Hart
453, 92 Pac. 1010 (1907);

22 Cal. Jur. 715.

nay reform it voluntarily as effectively as if the
on were decreed in an action in equity.
Am. Jur. 637;
A. L. R. 119.

instant case, reformation was not sought from
court nor was an attempt made in any way to
ne action into one for reformation. Plaintiff
that the true original intent should have been
and in any event, the original instruments had
een reformed by documents executed on Decem-
943. We did not assert that such contention or
reformation would be conclusive on the govern-
the government was, of course, free to attack
ty of the statement of the true original intent
e reformatory instruments. This they did not
npt to do. Whether the true original intent was
l or whether the voluntary reformation accom-
n December 14, 1943, was valid and effective,
sue in this case and properly before the Court.
ter of fact, this was the first opportunity for the
to litigate this question with the government.
ot necessary that a court reformation be first
before the trial court in this case could recognize
riginal intent or the effectiveness of the reforma-
uments. (See Civil Code, California, Sec. 1640.)
formation effected by the instruments should be

give the voluntary reformation the same effect
decree, which would be a proper result. Upon the
tion of an instrument, the rule is that it relate
and takes effect from the time of its original
especially as between the parties thereto and a
tors at large and purchasers with notice.

45 Am. Jur. 591.

Certainly, the government cannot assert that
prejudice or injury would result to it from accord
active effect to the correction of the clerical erro
respect, the government is not in the position
fide purchaser for value who has acquired rights
of the parties to the instrument sought to be ref

Cf. Baines v. Zuibeck (1948), 84 Cal
483, 191 P. 2d 67.

The government was never misled on accou
mistake in the slightest degree. On the contrar
information the government received would be
tax returns filed shortly after the creation of
and by these returns the government was notifie
trusts were irrevocable (pp. 332-333).

If Mr. Toor, prior to December 14, 1943
covered the error and attempted to revoke the
would have been the bank's duty as trustee to
revocation, to sue for reformation and reforma
have been granted. It cannot be assumed tha
would not perform its duties as trustee. In
Mr. and Mrs. Toor did not have the actual po
voke the trusts and this further distinguishes th

IF NOT GIVEN RETROACTIVE EFFECT, CORRECTION OF THE CLERICAL ERROR ACCOMPLISHED ON DECEMBER 14, 1943, ER THAN ON JANUARY 13, 1944, AS FOUND HE COURT. THIS CORRECTION WAS AC-LISHED WITHIN THE CALENDAR TAX-YEAR OF MR. AND MRS. TOOR AND OF TRUSTS AND PRIOR TO THE TIME THE RNMENT'S RIGHTS HAD ACCRUED.

14 was as follows [R. 70]:

ne trust instruments contain no statement that were not revocable by the grantors. It was not January 13, 1944, that there were executed dments to the trust instruments which stated hey were not so revocable."

ding is definitely without support in the evi-he only evidence is in the instruments them-ich state that they were executed on the date December 14, 1943 [Ex. 14; R. 177, 179]. The he officers of the bank acknowledged their sig-a later date is in no way contradictory of this t support the Court's finding. As a matter of cknowledgment was not even required for the to be effective.

he Federal income tax laws, profits accruing to hip during its fiscal year are not distributable nbers of such partnership until the last day of ear of the partnership, at which time they are l or become ascertainable.

in the case of an individual . . ." Sectio
vides in part that "the net income shall be comp
the basis of the taxpayer's annual accounting (
or calendar year as the case may be) . . ." I
182, each partner, in computing his net inco
quired to include his distributive share of the
income of the partnership, as computed by th
ship under Section 183.

The fiscal year of the partnership ended on J
each year, the first fiscal year ending June 30, 1
and Mrs. Toor and the trusts were each on a
year basis. Under these circumstances, Sectio
the Internal Revenue Code becomes applicable,
section provides:

> "If the taxable year of a partner is diffe
> that of the partnership, the inclusions wi
> to the net income of the partnership, in
> the net income of the partner for his tax
> shall be based upon the net income of the p
> for any taxable year of the partnership
> beginning on, before, or after January 1, 1
> ing within or with the taxable year of the

Accordingly, any net income accruing to th
ship during the first fiscal year, would not hav
cludable as income in the returns of the partne
calendar year 1942, but would necessarily have
cluded as income in their calendar taxable ye
December 31, 1943.

Section 166 of the Internal Revenue Code pro

166 is an exception to the general rule that in-
xable to the recipient, and said section must be
nstrued.

rton's Law of Federal Taxation, Vol. 6, p. 410.

tute does not provide that the trust as an entity
isregarded, nor does it require that a partner-
hich such trust might be a member, must be
d. The trust as well as the partnership are
ve, and the fiscal year adopted by the partner-
be recognized. In this connection see *Hash v.*
ner (1945), 4 T. C. 878 (aff'd. 4th Cir., 152
2), wherein the Court refused to permit the
ner to disregard the fiscal years set up by the
p agreements to which the trustees were parties,
nding that the taxpayers were chargeable with
on the income from the trusts.

Ir. and Mrs. Toor were on a calendar basis, and
the trusts were held revocable, the income accru-
the partnership to the trusts at the close of the
p fiscal year ending June 30, 1943, would have
included by them in computing their net in-
the calendar year ending December 31, 1943.
the rights of the government from a tax lia-
dpoint did not accrue until the close of the taxa-
to wit, December 31, 1943, and since the cor-
the clerical error was accomplished on Decem-
the government is not entitled to complain of
tion of such clerical error; Mr. and Mrs. Toor

The right to make corrections and adjustm
to the close of a taxable year has been clearly
by numerous decisions.

Huntington-Redondo Company v. Com
(1937), 36 B. T. A. 116;

Albert W. Russell v. Commissioner, 35
602.

**D. THE SAME GOVERNMENT ACCEPTED
NEE'S RETURN MADE SHORTLY AFT
CREATION OF THE TRUSTS ON AN IR
BLE BASIS; THE SAME GOVERNM
RENEGOTIATING WAR CONTRACTS, DE
AND RECEIVED SOME $60,000 BASED
RECOGNITION OF THE PARTNERSHIP
FISCAL YEAR WHICH COULD NOT OTH
HAVE BEEN ASSESSED OR COLLECTED**

1. Shortly after the creation of the trusts
gift tax returns were filed and accepted by th
ment on an irrevocable basis [R. 332-334].

2. As heretofore pointed out, a change in th
tiation law increased the amount of exemption
negotiation of persons, firms or corporations w
able year ended after June 30, 1943. Since th
ship's fiscal year ended June 30, 1943, it could
advantage of this increased exemption. If the
ship were not in effect, Mr. Toor could have
vantage of this increased exemption. By recog
partnership and its fiscal year, the government
able to renegotiate government contracts of th

regoing discussion has been directed to the in-
uing from the partnership at the close of the
ending June 30, 1943. The income accruing
30, 1944, for the previous fiscal year, and on
1945, for the previous fiscal year, of course,
the trusts after the trusts had unquestionably
e revocable. Such income would thus not be
Mr. and Mrs. Toor in any event.

Conclusion.

ue respect to the learned Trial Court, it is sub-
at the decision in the instant case violates the
tal precept of income tax law, that income shall
to he who earns it. This principle is broken
two further basic principles, one, that income
perty is attributable to the owner of the prop-
two, that income from personal services is at-
to the person rendering the services. There
son for applying different principles to partner-
ne. If an individual makes a bona fide gift of
e or of a share of capital stock, the rent or
ncome is taxable to the donee. Similarly, how-
owner of a partnership interest may have ac-
ch interest, the income is taxable to him for he
l owner.

instant case, the personal services of Mr. Toor
pensated for by a reasonable salary. The bal-
ne income from the business was earned by the
and the trusts were each a one-sixth owner of

first place, the situation is like that of a father
up a trust for his son by way of gift, and
the trust purchases real property. If the gift is
father is not taxed on the income even if he ac
the property for the benefit of the child. In t
place, the control of Mr. Toor was no more tha
a general partner in an ordinary limited pa
Furthermore, in weighing the effect of the ret
power upon the *bona fides* of a purported gift o
power exercisable for the benefit of others mu
tinguished from the power vested in a transfero
own benefit. To hold that the extent of contro
business in the instant case was such as to ch
Toor with earning the entire income therefrom i
tical effect to rule that a family limited partn
invalid for tax purposes where original capital is
tributed by the limited partners. The Trial C
has taken a limited partnership, otherwise valid
effect, ruled it invalid for tax purposes becau
existence of a family relationship.

In this case, there is no question as to the re
bona fides of the gift to the trusts. The trust
and beneficially acquired an ownership in the bu
the investment of a proportionate amount of cap
in, regardless of the fact that the capital orig
way of gift. There was no evidence of bad fa
soever and all of the evidence pointed to the g
of the parties. There was no substantial eviden
otherwise than that the parties joined together
faith to conduct a business, having agreed that t

bmitted that the decision of the Trial Court has a result whereby the taxpayer is required to or and pay a tax upon income which he had no receive, enjoy, or benefit from, but which right clusively in the trusts. By a ruling and unsupdings which indicate "at best an error in emhe Trial Court has judicially legislated the famd partnership formed with gift capital into a In this case, it is clear that Mr. Toor intended his particular gift to the trusts to $21,000; inwould be forced by this decision to pay in adne $200,000, without receiving or being entitled income upon which it is based. Under all the , this result is unjust and contrary to law.

cision of the Trial Court should therefore be insofar as it concerns the ruling that the partas not valid for tax purposes. It should further that the trusts should be considered irrevocable r inception, that the fiscal year of the partnerld not have been disregarded and that the inibuted to the trusts from their partnership inere erroneously attributed to Mr. and Mrs. Toor the years in question.

Respectfully submitted,

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Attorneys for Appellants.

ations Code of California:

5509. RIGHTS, POWERS AND LIABILITIES OF A PARTNER. (1) A general partner shall have ghts and powers and be subject to all the re- and liabilities of a partner in a partnership imited partners, except that without the written r ratification of the specific act by all the limited a general partner or all of the general partners authority to:

o any act in contravention of the certificate.

o any act which would make it impossible to the ordinary business of the partnership.

onfess a judgment against the partnership.

ossess partnership property, or assign their rights c partnership property, for other than a partner- pose.

dmit a person as a general partner.

dmit a person as a limited partner, unless the to do is given in the certificate.

ontinue the business with partnership property eath, retirement or insanity of a general part- ss the right so to do is given in the certificate.

5510. RIGHTS OF LIMITED PARTNER. (1) A artner shall have the same rights as a general o

ave the partnership books kept at the principal

partnership affairs whenever circumstances ren
and reasonable; and

(c) Have dissolution and winding up by
court.

(2) A limited partner shall have the right
a share of the profits or other compensation b
income, and to the return of his contribution a
in Sections 15515 and 15516.

Sec. 15523. DISTRIBUTION OF ASSETS. (1
tling accounts after dissolution the liabilities of
nership shall be entitled to payment in the
order:

(a) Those to creditors, in the order of p
provided by law, except those to limited partn
count of their contributions, and to general p

(b) Those to limited partners in respect to t
of the profits and other compensation by way
on their contributions.

(c) Those to limited partners in respect to
of their contributions.

(d) Those to general partners other than
and profits.

(e) Those to general partners in respect to

(f) Those to general partners in respect to

(2) Subject to any statement in the certifi
subsequent agreement, limited partners share in
nership assets in respect to their claims for c
in respect to their claims for profits or for co

IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

---

r E. Toor,

Appellant,

vs.

C. Westover,

Appellee.

---

r E. Toor and Florence D. Toor,

Appellants,

vs.

C. Westover,

Appellee.

---

eals From the United States District Court for the Southern District of California.

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trict Court did not err in finding that the taxpayer t enter into a valid partnership with his two minor n for income tax purposes, and therefore all the in- from the business constituted community income able to him and his wife for the taxable years in- 11

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Sec. 22 (26 U.S.C., 1946 Ed., Sec. 22).....

Sec. 166 (26 U.S.C., 1946 Ed., Sec. 166) 3,

Sec. 167 (26 U.S.C., 1946 Ed., Sec. 167).....

Sec. 181 (26 U.S.C., 1946 Ed., Sec. 181).....

Sec. 182 (26 U.S.C., 1946 Ed., Sec. 182).....

Sec. 188 (26 U.S.C., 1946 Ed., Sec. 188) .....

Sec. 3797 (26 U.S.C., 1946 Ed., Sec. 3797).....

MISCELLANEOUS

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13 George Washington Law Review (1945), p. 121, Pa
nership in Tax Avoidance.....

Treasury Regulations 111:

Sec. 29.22 (a)-1.....

Sec. 29.22 (a)-21.....

No. 12999

IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

E. TOOR,

Appellant,

vs.

. WESTOVER,

Appellee.

E. TOOR and FLORENCE D. TOOR,

Appellants,

vs.

. WESTOVER,

Appellee.

BRIEF FOR THE APPELLEE.

Opinion Below.

inion of the District Court [R. 57-63] is re-
94 Fed. Supp. 860.

Jurisdiction.

ly $104,100[1] in respect of Herbert E. Toor (
called the taxpayer). Such deficiencies (toge
substantially similar assessments asserted agains
Florence D. Toor, for the same taxable years
2)) were duly assessed by the Commissioner o
Revenue [R. 7-8, 14, 22-23], and were paid t
lector of Internal Revenue on or about Nov
1948. [R. 9, 10, 17, 25.] Claims for refund
on or about January 15, 1949 [R. 12, 20-21,
were rejected by the Commissioner by regist
dated August 19, 1949. [R. 12-13, 21, 29.] T
on October 21, 1949, and within the time pr
Section 3772 of the Code, the taxpayer brough
tion (and a similar one in behalf of his wife (Ap
in the District Court for the recovery of the
interest paid. [R. 3-42.] Jurisdiction was co
the District Court by 28 U. S. C., Section 1340
actions, involving identical issues, were consol
trial, without a jury [R. 55-57], in the Distr
[R. 88-89, 499-500.] Judgments for the Coll
entered on January 11, 1951. [R. 79-81.] M
a new trial were filed by the taxpayer and orde

---

[1]The exact net amount involved is not ascertainab
record since the District Court, pursuant to stipulation o
[R. 64-65], made certain allowances to the taxpayers
whereas certain portions of the deficiency assessments

ions were entered on February 6, 1951. [R. Within sixty days thereafter, and on April 5, taxpayers' notices of appeals were filed in each R. 82-84], pursuant to the provisions of 28 Section 1291.[2]

Questions Presented.

nether the District Court erred in finding that d limited partnership entered into between tax- l his two minor children was not valid for fed- ne tax purposes, to the end that all the income business constituted community income charge- ne taxpayer and his wife for the taxable years

ernatively—if the first question is answered in native—whether the court below correctly held two trusts created by the taxpayer and his wife nber 20, 1942, for the benefit of their two minor were revocable, and that the amendments thereto ffective on January 13, 1944, and therefore did the original trusts irrevocable as of the date creation.

Statutes and Regulations Involved.

plicable statutes and Regulations are set forth in ndix, *infra*.

urt, pursuant to stipulation of the parties of July 9, 1951, order on August 3, 1951, providing that *Herbert E.*

Statement.

The pertinent facts as found by the District respect of the two trusts and the family partn 67-69, 70-73] may be summarized as follows:[3]

On November 20, 1942, the taxpayer, as m his marital community's property, entered into agreements with the Beverly Hills National Trust Company, as trustee (hereinafter called or trustee), to create trusts for his two mino Bruce Allan Toor and Barbara Lee Toor (T 774 and 775).[4] At the same time, the taxpay bank, as trustee, executed articles of limited p for the sharing of the profits of a furniture m ing business theretofore operated by the taxpa the name of the Furniture Guild of California. and limited partnership agreements were presen bank by the taxpayer as one package. [R. 70.]

Each trust was in the sum of $10,500. The t authorized to invest the trust funds only in bu which the taxpayer was a partner or principal s or in Government bonds. In each trust deed th reserved the power to remove the trustee and p in its place, without limitation. [R. 70.] Th struments contained no statement that they w vocable by the grantors. It was not until Ja

---

[3]The District Court findings in respect of several pertaining to certain deductions claimed by the taxpay 76, pars. 32-40] have been omitted for they were not

there were executed amendments to the trust
ts which stated that they were not so revocable.
.]

the articles of limited partnership, the taxpayer
red to be a general partner, and the bank as
as declared to be a limited partner. The part-
as not to terminate until 1955, and the interest
ited partner was also stated to be not transfer-
e taxpayer, however, had the right to terminate
gement upon giving a thirty-day notice of in-
dissolve it, and he had the absolute right to
the interest of the limited partner at "book"
he taxpayer, under the partnership agreement,
ull charge and control of the entire business, and
power and authority to do any act necessary or
t with respect to the business. While under the
the business profits were to be divided on the
the ratio of one-sixth to each trust and four-
the taxpayer, he nevertheless had the right to
the profits at such times and in such amounts
ermined. [R. 71.]

ustee contributed neither independent money nor
uring the existence of the partnership. [R. 71.]

eation of the limited partnership did not change
y the control which the taxpayer exercised over

The control of the business income and the r
its allocation, the salaries to be received by the
and the employees, the amount to be paid for
of the taxpayer's property on which the bus
carried on—in brief, the determination of al
requiring judgment of management, control of
erty, the disposition and allocation of funds der
the business, including amounts to be allocated
were so exclusively under the domination of the
that, to all intents and purposes, the creation of
nership made no change whatever in the manner
the business had been conducted before. [R. 72.

No instance appears where the bank or its r
tives used independent judgment or suggested a
other than that proposed by the taxpayer. T
exercised none of the rights of partnership eve
of advice. The trustee did not exercise dom
control over the trust corpus in the business ar
influence the conduct of the partnership or the
of its income. [R. 72.]

The nature of the business was such that the
personal services, business judgments and skill
important role in the earning of the business inc
to the extent that capital played a part, becau
control over the corpus and income and his re
so many of the attributes of ownership of the tr

tire effect of the establishment of the partner-
merely to permit the taxpayer's children to re-
rtain amount of the income when he determined
income was subject to distribution rather than
to other business determined by him. [R. 72-

xpayer and the trustee did not act with a business
n setting up the limited partnership. [R. 73.]

xpayer and the trustee did not in good faith in-
in together in the present conduct of the business
. [R. 73.]

e fiscal period November 20, 1942, to June 30,
l for the fiscal years ended June 30, 1943, and
1944, the taxpayer caused partnership income
ns to be filed in the name of the alleged limited
ip, the Furniture Guild of California. As shown,
isted of the taxpayer as general partner and the
a limited partner. [R. 67.]

e years 1943, 1944 and 1945, the taxpayer and his
rence D. Toor, filed federal income tax returns
mmunity property basis for each calendar year.
uded in those returns, among other income, their
stributive shares of the partnership income from
iture Guild of California for the partnership's
rs ending within their taxable calendar years.

sum to the Collector of Internal Revenue. On
November 15, 1948, as a result of a deficiency a
by the Commissioner of Internal Revenue, the
paid $32,710.48 to the Collector in partial payn
total of $38,639.08 in additional income taxes an
assessed by the Commissioner for the year 1943.

For the year 1944, the taxpayer reported $
due in income taxes, and in due course paid tha
the Collector. On or about November 15, 19
result of a deficiency assessment by the Commiss
taxpayer paid to the Collector $27,344.42 in addi
come taxes and interest for the year 1944. [R.

For the year 1945, the taxpayer reported $
due in income taxes, and in due course paid tha
the Collector. On or about November 15, 19
result of a deficiency assessment by the Commiss
taxpayer paid to the Collector $38,125.80 in addi
come taxes and interest for the year 1945. [R

On or about January 15, 1949, the taxpayer fil
for the refund of the deficiencies, plus interest
him for the taxable years 1943, 1944 and 19
August 19, 1949, the Commissioner rejected suc
[R. 68.] Thereupon the taxpayer brought this
October 21, 1949. [R. 69.]

On the basis of the foregoing facts, the Distr
held that the corporate trustee of the trusts c
the taxpayers for the benefit of their two mino
may not properly be recognized as a limited par
him in the business; and that the trusts were

Summary of Argument.

is case presents simply another attempt to achieve eallocation of income among an intimate family rough the instrumentality of a limited partner- hout effecting any change in property control. tion is whether, considering all the facts, the good faith and acting with a business purpose to join together in the present conduct of a busi- prise. Under controlling law, this question must red in the negative. Moreover, upon a proper tion of the various evidential factors, the District ınd that the taxpayer and his minor children did into a good-faith partnership recognizable for x purposes. This finding is substantiated by the and is therefore not clearly erroneous. Conse- t should not be disturbed upon appeal.

he childrens' contributions of gift capital to the ip, as opposed to independent original capital, show that they thereafter exercised no control ion whatever over the capital contributed. Such nce tends to indicate that no real partnership was Since the gifts were conditioned on reinvestment rtnership business, they were not complete and ɔnal, and therefore the partnership is not genuine. rens' inclusion in the partnership as limited part- s, when assessed with a view to the other circum- ıvolved, to indicate that no real partnership was Similarly, the retention of managerial power gift capital by the childrens' father likewise indi-

lack of dominion on the part of the children o
alleged property. Moreover, there is shown no
purpose for the creation of the partnership. Th
er's admitted sole desire to help his children as
reason for forming the partnership is a personal
by no stretch of the imagination a business purpo
desire failed because of the incompleteness of th
the children, the taxpayer, at the time of making
still having full power to revest in himself tit
property because the trust instruments were th
able. Finally, the taxpayer was fully aware o
benefits to be derived by including the childre
partnership. Since the evidence shows that the
ject of creating the partnership was to diminish
partnership was ineffective for tax purposes.

2. There is no basis in the record for the t
alternative contention that if the partnership be h
then he and his wife should not be held taxab
income of the trusts now attributed and allocat
partnership for the fiscal year ended June 30,
therefore included in their calendar year return
year, under the applicable statute. Such income
to the taxpayer in any event for the year 1943,
applicable statute, because the trusts were revoca
time he transferred property to them, and the
therefore had full power to revest in himself ti

ARGUMENT.

I.

trict Court Did Not Err in Finding That the payer Did Not Enter Into a Valid Partner- With His Two Minor Children for Income Purposes, and Therefore All the Income m the Business Constituted Community In- e Chargeable to Him and His Wife for the able Years Involved.

District Court found that a *bona fide* partnership, for federal income tax purposes, was not created the taxpayer, as manager of the marital com- roperty, and his two minor children. This find- he Supreme Court has held, is purely one of fact, ng the taxpayer's demonstration that it is clearly s, it is conclusive. *Commissioner v. Culbertson,* S. 733; *Commissioner v. Tower,* 327 U. S. 280; *v. Commissioner,* 327 U. S. 293. It was for the Court to weigh and draw its conclusions from vidence, conflicting or otherwise (*United States v Cab Co.,* 338 U. S. 338, 342; *United States Estate Boards,* 339 U. S. 485, 495-496); and so ts findings are supported by the evidence and are n to be clearly erroneous, due regard being given

Procedure; *United States v. Gypsum Co.,* 333 U
395-396, rehearing denied, 333 U. S. 869; *Joe E*
& Co. v. Commissioner, 177 F. 2d 867, 873 (C.
Ruud v. American Packing & Provision Co., 1
538 (C. A. 9th); *Grace Bros. v. Commissioner,*
170 (C. A. 9th)). It is our position that the
has not demonstrated that the District Court's
are clearly erroneous, and, furthermore, that he
so for there is ample evidential support for its

We contend that the facts of this case show
device designed to achieve a paper reallocation
among an intimate family group, without effe
change in the control of the property which pro
income or in the real economic position of th
Moreover, the taxpayer's simultaneous partne
trust agreements were ineffective for income tax
to the end that any of the business income
turned over to the trusts remained taxable to hi
he retained so many of the attributes of owners
trust assets in his business that he must still be
to have created the entire business income, whi
able to him who earns it. *Cf. Lucas v. Earl,*
111; *Burnet v. Leininger,* 285 U. S. 136; *He*
Clifford, 309 U. S. 331; *Helvering v. Horst,*
112; *Helvering v. Eubank,* 311 U. S. 122; *H*
Schaffner, 312 U. S. 579; *Helvering v. Stuart,*
154, rehearing denied, 317 U. S. 602; *Commi*

412-413 (C. A. 9th); *Eisenberg v. Commissioner,* 2d 506, 510-511 (C. A. 3d), certiorari denied, S. 767.[5]

tion of the present case depends in particular principles enunciated by the Supreme Court in *ioner v. Tower, Lusthaus v. Commissioner,* and l more recently in *Commissioner v. Culbertson,* . In the *Culbertson* case, consistent with the of the *Tower* and *Lusthaus* cases, the Supreme ld (p. 742) that in testing the reality of a part-

question is * * * whether, considering all facts—the agreement, the conduct of the parties xecution of its provisions, their statements, the mony of disinterested persons, the relationship of parties, their respective abilities and capital con-utions, the actual control of income and the pur-es for which it is used, and any other facts throw-

Partnership in Tax Avoidance, 13 George Washington L. 142-143 (1945):

we would truly orient the subject under discussion, we l recognize that the family partnership problem cannot be ssfully treated as a local disease. Family trusts, family erships, family corporations, are in one sense all the same They all may seek to reduce taxes by splitting, postpon-r otherwise controlling the receipt of taxable income with-substantial surrender of dominion by the person who otherwise have to pay the tax. They may not change mic status, but merely present different facades. Substan-wnership, business, the operations of daily life, may go on ore. Lawyers who put aside their special interest as advo-and their inherent fondness for legal subtleties, know

ing light on their true intent—the parties
faith and acting with a business purpose int
join together in the present conduct of the er

This question, the Court said (p. 743), is one of
fact for the trial tribunal. While no one circum
conclusive, nevertheless (p. 744)—

> Unquestionably a court's determination
> services contributed by a partner are not "v
> that he has not participated in "management
> trol of the business" or contributed "original
> has the effect of placing a heavy burden on
> payer to show the bona fide intent of the p
> join together as partners. * * *

The Supreme Court also indicated (p. 747) th
family partnerships are subject to special scrutiny
purposes, an intra-family transfer of business cap
render the transferee the true owner and therefo
partner in the tax sense, "if" he exercises active "
and control" over the property, "and through tha
influences the conduct of the partnership and the
tion of its income." Throughout its opinion, the
Court reiterated the principles it had previously en
in the *Tower and Lusthaus* cases, *supra*. The rat
its decisions in all three cases is that the Tax Cou
obliged to accord tax effect to a family partne
rangement which produces no substantial chang
creation of the business income, but merely a rea
of it within the family, even though the arrang
valid under state law and as to third parties.
reaffirming the principles laid down in the *Tower*

t's holding that the husband, through his owner-
of the capital and his management of the busi-
actually created the right to receive and enjoy
benefit of the income and was thus taxable upon
entire income under Sections 11 and 22(a). In
case, other members of the partnership cannot
onsidered "Individuals carrying on business in
nership" and thus "liable for income tax . . .
eir individual capacity" within the meaning of
on 181. * * *

inciples laid down by the Supreme Court in the
d *Lusthaus* cases, and reaffirmed in the *Culbert-*
have been applied many times by this Court and
Courts of Appeals. See, e. g., *Giffen v. Com-*
, 190 F. 2d 188 (C. A. 9th); *Nordling v. Com-*
, 166 F. 2d 703 (C. A. 9th), certiorari denied,
. 817; *Batman v. Commissioner,* 189 F. 2d 107
5th), certiorari denied November 13, 1951;
. *Commissioner,* 189 F. 2d 856 (C. A. 5th);
. *Commissioner,* 161 F. 2d 495 (C. A. 5th),
denied, 332 U. S. 810; *Feldman v. Com-*
, 186 F. 2d 87 (C. A. 4th); *Ritter v. Com-*
, 174 F. 2d 377 (C. A. 4th); *Morrison v.*
oner, 177 F. 2d 351 (C. A. 2d); *Morano v.*
oner, 175 F. 2d 555 (C. A. 3d), certiorari de-
U. S. 904; *Barrett v. Commissioner,* 185 F. 2d
A. 1st); *Denison v. Commissioner,* 180 F. 2d
A. 6th), certiorari denied, 340 U. S. 817; *Appel*
161 F. 2d 121 (C. A. 6th); *Kohl v. Commis-*

Following the foregoing pronouncements
Supreme Court in the *Culbertson* case [R. 58
court below examined the pertinent facts [R. 60
thereupon found that no valid partnership bet
taxpayer and his two minor children had been
[R. 73.] We submit that this ultimate finding
dantly supported by the evidence and is therefo
correct.

In the first place, we think that the issue is
by this Court's recent decision in *Giffen v. Comm*
190 F. 2d. 188, the factual situation of whic
stantially on all fours with that here, with in
exceptions. There this Court refused to reco
taxpayer's minor children as real partners,
further that the conditional gifts made to the
taxpayer and his wife did not relieve the dono
liability on the income from the partnership.
payer's wife was appointed guardian of the
property, both the taxpayer and his wife hav
gifts of undivided interests in the property to the
The gifts were expressly conditioned upon their
ment in the limited partnership comprising all t
members. The ten-year limited partnership a
gave the husband full possession and exclusiv
and management of the property, as well as f
to retain all income. The limited partners' inter
not assignable. This Court concluded that the

ut merely contingent interests that might become after ten years. The Court found no business no contribution of services by the children, and capital investments by them. Accordingly, the d not recognize the children as limited partners ifts as valid, and it therefore held that the income property was taxable equally to the taxpayer and

the District Court, in arriving at its conclusion, applied the foregoing principles enunciated by eme Court, this Court and the other Courts of in like or similar situations. Thus, an examina- he District Court's opinion, in the light of those s, discloses that in concluding that no good-faith nip was formed with respect to the taxpayer's it relied upon the following factors: As limited the children were not intended to and never orm any vital services for the business; nor did tribute any independent capital, any new capital vas not previously in the taxpayer's business. ey contributed was given them only upon condition y invest it in the so-called partnership business axpayer, or in Government bonds. The entire of the partnership business and affairs was left in ayer's hands, just as before creation of the part- and the children in no way participated in the nent and control of the business or over the prop- income, which was ostensibly given them. The were not absolute and complete because the con- placed thereon stripped the children of freedom

amendment on January 13, 1944; therefore, it fol
taxpayer never divested himself of the proper
sibly given the children in trust on November
and the taxpayer could have revested title in h
any time in the interim. *Gaylord v. Commissio*
F. 2d 408, 414 (C. A. 9th).

Nor could the children, as limited partners,
any interest they had in the partnership [R. 38,
and they could sell it only to their father at "boo
[R. 37-38, 62.] Their father alone had complete
and control over the property [R. 37] and the
and disposition of all the partnership assets and
He could dispose of them at any time he saw fi
before creation of the partnership. He was
powered to terminate the partnership arrangem
thirty days' notice of intention to dissolve and
absolute right to buy out the children's interests
value at any time. [R. 37-38, 62, 71.] While
ness profits were distributable in the ratios pro
the partnership agreement, nevertheless the fathe
sole right to determine whether the partnershi
was to be accumulated or distributed, and at su
and in such amounts as he should determine. [R

While the District Court recognized that limi
ners are restricted in the extent of their par
in partnership affairs, it pointed out that the ta
children never exercised *any* of the rights of
partner, such as voice in the management and di
of the partnership property and the income t
[R. 61-62] and at no time contributed anythi

of the partnership income. [R. 71-72.][6] More-
children are not shown to have enjoyed much
ruits of their supposed investment of $10,000
ond the sums paid for the trustee's administration
and income taxes. [R. 189, 288.] The record
iat the taxpayer, with ample resources (cash
rities) available for the purposes, actually made
ribution" of partnership profits to any of the
uring the first period from the inception of the
ip in November, 1942, to the end of its first
ar on June 30, 1943. [R. 412; R. 419, Ex. J.]
er, he distributed to each trust, in excess of the
necessary to pay the trust fees and income
ly $1,295 up to June 30, 1944 [R. 415; R. 419,
$6,822 up to June 30, 1945 [R. 416; R. 421, Ex.
a distribution of only $7,500 for each trust, out
the trustee had to pay more than $6,100 for taxes
, up to the year ended June 30, 1946 [R. 419,
. 420, Ex. K.] On the latter date *after the tax-*
rs, however, he distributed sums in excess of
to each trust [R. 419, Ex. J], one month before
ferred the partnership business to a corporation he
n exchange for its stock [R. 184-189, 196, Exs.
6; R. 419, 421, Exs. J and L; R. 498-499.] The
, having complete and exclusive power of alloca-
disposition of the income from the business, in-

connection, we submit that the fact that the children were
nly as *limited* partners without possibility of contribution
ident capital for, as shown, it still belonged to the tax-

cluding any amounts allocated as profits for ea
[R. 36], used most of the income in his business
sequently little for the childrens' trusts. [R. 4
417.]

The taxpayer did intend to make provision
children for the future by transferring property
for their benefit [R. 103, 117-127, 190], provid
ever, that the trustee should become a limited
and invest the trust corpus in the business, or in
ment bonds. [R. 118-119, 370.] This was acco
by the creation of the trusts and formation of t
nership on the same day, as part of a single pl
30-42, 70; R. 106, Ex. 2; R. 317-320.] The
however, was not given any opportunity to in
corpus of the trust in Government bonds for the b
given the gift in trust together with the partnersh
ment, both "as one package." [R. 70, 370-371.]
the same time, the taxpayer, in making the t
limited partner, retained full control over the ent
ness property and income, including the trust inv
to the exclusion of the bank and all others. [R.
A, par. Eighth; R. 481-485.] He made doubly
of this by retaining the power to substitute
trustee, not excluding himself, or to discharge the
trustee at any time, if necessary, for reasons of
[R. 122-123, Ex. 4, par. Ninth.]

e taxpayer testified that he could recall no such
[R. 289.] A business purpose behind the for-
a partnership is required, however, by *Commis-*
Culbertson, 337 U. S. 733. Contrary to the al-
iness purpose claimed by the taxpayer now (Br.
ıe District Court found [R. 73] that the taxpayer
rustee did not act with a business purpose in set-
ıe partnership. The taxpayer himself testified [R.
: he could not recall anything about when they
nto this agreement, [as to] how the limited part-
vould benefit the business, in any way," or that
any "purpose in entering into this agreement, of
the business in any way." To determine what is
l by the requirement of a business purpose re-
tle definition. The words and the requirement
. Does the transaction serve the business, or
relation to it? *Slifka v. Commissioner,* 182 F.
C. A. 2d); *Gregory v. Helvering,* 293 U. S. 465,
The so-called partnership transaction herein
erve the business in any respect; the taxpayer's
went on, just as before, completely in the hands
ame proprietor. The taxpayer's "sole purpose"
ake care of the children," as he testified [R. 190],
ough laudable, is a *personal* purpose—not a busi-
ose by any stretch of the imagination. *Hash v.*
ioner, 152 F. 2d 722 (C. A. 4th), certiorari
28 U. S. 838, rehearing denied, 328 U. S. 870

that the taxpayer was aware of the tax benef
derived by himself upon including the childre
partnership, and that "the conclusion is warrante
sole object was to diminish tax liability" thereby
v. Commissioner, supra, p. 346. As *Miller v.*
sioner, 183 F. 2d 246, 254 (C. A. 6th), demands
examine the transaction to see if any benefit
the business. Clearly, in the present case, no su
is shown to have resulted to the business by the
of the children in the partnership. Nor did the
of the partnership *add* anything to the taxpayer's
or make any change in any way in the manner
he had conducted it before. [R. 61, 71.]

Upon all these considerations rests the Distric
ultimate finding that there was no intention t
real good-faith partnership between the taxpaye
minor children to join together in the present c
the business enterprise. [R. 73.] *Commissione*
bertson, supra. We submit that the factors con
as to which there can be no dispute—are ample
the District Court's conclusion and, as shown,
as the Supreme Court indicated in the *Tower,*
and *Culbertson* cases should be considered in
the issue before it.

In the light of the foregoing, we submit that
trict Court's decision is unassailable. The taxpa
ever, argues incongruously that there is "no" e
support nine of the District Court's primary fi
fact from which it drew its ultimate finding [
that the taxpayer and the trustee did not in g

ip for income tax purposes.[7] (Br. 20-44.) We
ady shown, however, that most of the indicia of
tnership recognizable for tax purposes, as ruled
upreme Court in the *Tower, Lusthaus* and *Cul-*
ases, are absent here. The taxpayer relies on the
cial's testimony [R. 376]—that he understood
children "actually" entered into the partnership
ever benefits they might derive through the trusts
partnership business—as a criterion of the good-
tnership. (Br. 20-21.) In refutation thereof,
the trustee's representative also testified [R.
answer to the question whether it was "your
at the time you entered into this agreement to
arry on the furniture business with Mr. Toor
make an investment in this business," that "It
estment"; also [R. 371], as to whether "you did
ove specifically * * * the entry into the
ip, but regarded the partnership investment as
al asset of the company, accepted by your trust
" he replied that "It was considered * * *
ackage." This, we think, disposes of the con-
at the children contributed capital to the partner-
43), for the court below found that the trustee

re given by the taxpayer as being present here in support
entions, as follows: business purpose in the formation of
rship; contribution of capital; the rights of the bank-
limited partner (Br. 42) "at all times * * * to exercise
es of ownership and the rights of a limited partner with
he partnership business and its assets, and to receive its
te share of profits as fixed by the agreement"; substan-
in the economic relationship of the taxpayers and their

contributed neither independent money nor servic
[R. 71], and the evidence shows, in harmony
that the funds put into the partnership by the
trusts were admittedly merely "an investment."
Whatever weight may be given to the childre
contribution as a factor, therefore, is negatived
by the fact that their gift-property still belong
taxpayer, as shown, but also by virtue of the
retention of absolute dominion and control over
ness and the income thereof, to the end that *he*
be considered as the real earner of all the busine
as the court below found. [R. 72.]

The taxpayer argues (Br. 28-30), in effect
District Court, in finding no contribution of the
loses sight of the fact that they could make but
tribution because of their status as limited part
states that the trustee, recognizing the restr
respect of limited partners under California l
exercised its rights to which it was entitled be
management of the partnership business being e
in the hands of the taxpayer, they never felt ca
to do so. (Br. 28-30.) As we have suggest
the mere fact that the children were taken i
limited partners tends to indicate that they we
be members of a good-faith partnership. See fn
If, because they are limited partners, they are t
contribution whatsoever save their nebulous cc
of capital, then we submit that in view of the
their capital contribution, they have contribute
and therefore cannot be considered partners in

that income must be taxed to him who earns
missioner v. Culbertson, 337 U. S. 733, 739-740.
, by itself, the right of the general partner to
at will the interest of the limited partners may
ate that no real partnership has been created,
urt below noted this provision of the partnership
t only as one of the many factors spread before
2, 71.] In combination, however, with the total
minion in the children over their so-called capital
on [R. 71-72], we submit that the provision for
by the managing partner is confirmatory of the
Court's ultimate conclusion [R. 73] as to the
of *bona fides* of the partnership arrangement.
United States, 176 F. 2d 651 (C. A. 6th).

ttled that the alleged partners must make some
on, either of labor or capital, for if they con-
othing it can hardly be contended that they are
ay responsible for the production of the partner-
me. *Commissioner v. Culbertson, supra,* pp.
Although the Court in the *Culbertson* case
d that a donee of intra-family capital could
partner through investment of that capital, the
o limited this recognition by stating (p. 747):

ne donee of property who then invests in the
y partnership exercises dominion and control
that property—and through that control influ-
the conduct of the partnership and the disposi-
of its income—he may well be a true partner.
ther he is free to, and does, enjoy the fruits of
artnership is strongly indicative of the reality of

receives any of the fruits of the partnership, su
strongly indicate that there was no real partners
is precisely the situation here. Whether there
pation in management and control is a question
importance, just as the contribution of capital an
may be. *Commissioner v. Culbertson, supra,* p.
same is true as to whether the alleged partne
any of the fruits of the business.

As the decisions recognize, if a family part
bottomed upon gift capital, as here, there m
completed gift. That gift must also be unc
Commissioner v. Tower, 327 U. S. 280; *Gree*
Commissioner, 177 F. 2d 990 (C. A. 7th); *Cul*
Commissioner, decided August 2, 1950 (1950 P
Memorandum Decisions, par. 50,187), pending
Court of Appeals for the Fifth Circuit. The
apparently disregards the condition imposed upo
to the children here, but the condition is in
There was to be no gift unless it was reinves
alleged partnership. [R. 70.] The entire capi
children was encumbered with that obligation.
capital base cannot, we submit, bottom a *bona*
nership, certainly not when it is the sole contr
the children. The Tax Court refused to recogn
tribution of gift capital in the *Tower* case, *supr*
the husband-taxpayer there gave capital to his
the condition that she reinvest it in the business.
clusion of fact was affirmed by the Supreme Cou
the controls are retained by the grantor under

Commissioner, 153 F. 2d 408, 412-413 (C. A.
Section 29.22(a)-21 of Treasury Regulations
ulgated under the Internal Revenue Code. In
v. Commissioner, 161 F. 2d 506 (C. A. 3d),
denied, 332 U. S. 767, the court stated (pp.

e Tax Court in this case evidently concluded
he gifts in trust were not complete. We do not
e how large a "bundle of rights" the petitioners
eld; it is sufficient that the rights retained en-
them to make distributions to the minor bene-
es according to their discretion, and to continue
both the corpus and the income of the trusts in
artnership business exactly as though they were
vners thereof, without right in the beneficiaries
eive any distribution until the termination of the
as hereinbefore mentioned. Petitioners contend
hey could have prevented distribution of income
e trusts only by denying distribution to them-
. The effectiveness of this argument may be
d in the light of the fact that under the terms
e partnership agreement, to which the trusts
subservient, petitioners could adjust their sal-
as they saw fit and siphon off all net income
y by executing a written agreement on or be-
he first of each year.

ne taxpayer contends that once the partnership
lished all the benefits possible went into the
neither the taxpayer nor his wife benefited from
earned by and contributed thereto. (Br. 44.)
below found, however, that the effect of the

subject to distribution rather than to diversio
business as determined by him. [R. 72-73.]
the record shows that the partnership profits
"distributed at such time, and in such amounts,
from time to time, determined" solely as the
might see fit [R. 36], and that he had full
authority if, as and when "convenient * *
limitation" to do so, except only as circumscri
laws pertaining to limited partnerships. [R.
shown, the children enjoyed very little real ben
large profits of the partnership, over and
amounts of the bank-trustee's administration c
maintaining the trusts, as well as to pay th
taxes. [R. 189, 412, 415, 416; R. 419, Ex. J
taxpayer testified [R. 288], contrary to his pre
ment (Br. 44), "I don't think we distributed
come" due the trusts during the taxable years
sioner v. Culbertson, supra, p. 747.

Finally, the taxpayer contends that the forma
partnership effected a substantial change in th
relationship of the taxpayers and their childr
income in question. (Br. 43.) The court be
[R. 72-73], however, that the creation of the
changed in no way the taxpayer's absolute co
cised over the business, or the manner in whic
ness had been conducted by him before the
was formed [R. 61, 72], and that the only diff
that it permitted the children to receive *so*
whenever the taxpayer might decide that there

ıent, during the taxable years at least [R. 189, 415, 416; R. 419, Ex. J], and only as he saw 72-73.] As the court below found [R. 72], e extent that capital played a part in the busi- rtheless because of all these things the taxpayer st still be considered to have created the entire ıcome." *Cf. Commissioner v. Sunnen,* 333 U. 04-606, where the Court pointed out that the s not whether the taxpayer actually receives in- ch he provides for his children and members of group but that the crucial question is "whether or retains sufficient power and control over the roperty or over receipt of the income to make it to treat him as the recipient of the income urposes * * *, the receipt of income by the as- rely being the fruition of the assignor's economic

mit that the foregoing effectively negatives the final argument that the proper application to here of the principles governing the validity of rtnerships as enunciated by the Supreme Court *ver* and *Culbertson* cases, allegedly indicates that sion of the court below as to the validity of the partnership, is contrary to law. (Br. 45-54.) that contention appears wholly concluded by 's decision in *Giffen v. Commissioner,* 190 F. 2d ı, as heretofore shown, involves almost an iden-

II.

The Taxpayer Was Taxable Upon the Tru While the Trusts Were Subject to His Revoke.

Alternatively, in the event this Court shoul taxpayer's partnership to be valid for tax pu taxpayer contends further that the trustors an tee intended the original trust instruments to revocable trusts on November 20, 1942, but that of a clerical error the irrevocability clause wa tently omitted therefrom as drawn up on that that thereupon the parties corrected the mistal tively by confirmatory documents executed on 14, 1943, so that the trusts should be conside cable from their inception; hence, he urges th his wife should not be held taxable on the inc trusts now attributed and allocated to the part the fiscal year ended June 30, 1943. (Br. 55-

The District Court, upon ruling that the part tity was not effective for tax purposes, held f 62-63] that—

> the trust as originally created was revocal amendment to the instrument which becan on January 13, 1944 could not be retro the past so as to make the original inst revocable as of the date of the trust's cre tax purposes we must take the instrume ten, and as stated at the trial, we can no action into an action to reform an instru *Gaylord v. Commissioner*, C. A. 9, 1946, 1

:ord shows that the trusts, as originally exe-
ıtained no provision making them irrevocable
17-127]; hence, the taxpayer had the power to
:m, under California law. Section 2280, Deer-
ornia Civil Code (1949) (Appendix, *infra*);
. *Commissioner,* 153 F. 2d 408, 412-413 (C. A.
ıe record also shows that by the instrument
ember 14, 1943, but not notarized by the trus-
anuary 13, 1944, the trusts were made irrevoca-
latter date. [R. 176-180, Ex. 14.] The rea-
ıe discrepancy in the dates is not clear but since
ver introduced no testimony to explain it, it must
ed that he drew up and signed the document on
date, and thereupon sent it to the trustee who
xecute it until the later date, as shown herein-
ıus, the trustee quite clearly did not approve the
ıt to the trust instruments until January 13,
R. 177, 179.]

166 of the Internal Revenue Code (Appendix,
ovides that where at any time the power to revest
ıntor title to any part of the corpus is vested in
or, either alone or in conjunction with any person
g a substantial adverse interest in the disposition
orpus or income, then the income from such part
st shall be included in the grantor's net income.
espective of the taxpayer's arguments to the con-
income from such trusts was taxable to him.

er, whatever the intention of the parties, the
ıt could not have retroactive effect as far as

exercise it. *Gaylord v. Commissioner, supra,* pp
Krag v. Commisisoner, 8 T. C. 1091. *Cf. Ei*
Commissioner, 161 F. 2d 506, 510 (C. A. 3d),
denied, 332 U. S. 767; *Daine v. Commissioner,*
449 (C. A. 2d). This reinforces our earlier
that it was the property of which the taxpaye
divested himself of control at the time of the g
he put into the partnership in behalf of the tru
clearly, the trustee did not have, even technic
legal instant, the true ownership of the assets
was required to put into the partnership busi
Schaeffer v. Commissioner, decided September
(1948 P-H T. C. Memorandum Decisions, par
affirmed *per curiam,* 174 F. 2d 827 (C. A. 3d),
denied, 338 U. S. 910. In any event, any inco
earned by the trustee as a partner with the taxpa
be taxable to the taxpayer only to the extent it
prior to January 13, 1944 [R. 62-63, 70-71],
hereinafter.

The taxpayer argues further that even if th
13, 1944, amendment to the original trust instr
November 20, 1942, is not given retroactive eff
theless correction of the alleged clerical error w
by the amendatory documents executed on Dec
1943, rather than on January 13, 1944, when
signed the instrument, as the court below four
63], and since that was within the taxable cal
1943 of the taxpayer and his wife as well as of
the partnership net income for the fiscal year e
30, 1943, would, under Section 188 of the Inte

ntity of the trusts or the partnership be disre-
e income accrued to the trusts from the partner-
e close of the latter's taxable fiscal year ended
943, should be included in the taxpayers' taxable
December 31, 1943, in computing their taxable
e for that year, under the provisions of Section
hat since their tax liabilities did not accrue until
ay of their taxable year 1943, and the alleged
ror was corrected by the amendatory documents
y them on December 14th of that year, the tax-
grantors, were not required to include, in com-
ir net income for 1943, the income of the trusts
ear, even assuming that the trusts be held re-
until December 14, 1943. (Br. 61-64.) This
applies only to the taxpayers' calendar year
he partnership's fiscal year ended June 30, 1943,
other taxable years involved here. (Br. 65.)

s no basis in the record for these contentions.
ict Court found [R. 70-71] that the trust in-
contained no statement that they were not re-
the grantors, and that it was not until January
that there were executed amendments to the
uments which stated that they were not so re-
In harmony therewith, it concluded correctly that
al trusts created on November 20, 1942, simul-
with the partnership agreement, were revocable
xecution of the amendments thereto on January
which was the effective date for the irrevocability
sts, and that date could not be retrojected into

415 (C. A. 9th). Contrary to the taxpayer's
(Br. 61), the record clearly supports the Distr
finding and decision to such effect for it show
tionably [R. 176-180, Ex. 14] that the amendat
ments were signed first by only the taxpayer an
as attested by notary public Natalie Holbrook,
ber 14, 1943 [R. 178-179, 180], and that, f
undisclosed, they plainly were not accepted, ack
and signed by the trustee-bank officials, as attes
tary public Pauline Hudson, until January 13,
177, 179.] Further support is found for this in
nal declaration of trust [R. 117-127, Ex. 4]
taxpayer and his wife *and* the trustee all sign
strument *on the same day,* as attested by the no
[R. 125-127], just as they (except the taxpay
did in the case of the partnership agreement
Ex. A] which was executed on the same day a
agreements. [R. 40-41.] Moreover, the tax
nishes no evidence whatever, other than his
ments, to the contrary, and we have been able t
in the record. Certainly the taxpayer's bald st
a "fact" that the officers of the bank merely ack
before the notary, on January 13, 1944, their
allegedly affixed to the instruments at an earlie
have no probative value here, and in the abse
other evidence more convincing to the contrary
as the court below held [R. 63], accept the orig
ments, as written, for tax purposes.

In these circumstances, it is clear that, unde
laid down by this Court in *Gaylord v. Commissi*

the taxpayer-grantors of liability under Section
Internal Revenue Code for federal taxes on the
the trusts for the taxable year 1943. Hence, it
hat the District Court properly sustained the
oner's computations of the taxpayers' tax lia-
the taxable year in question by using the part-
proper fiscal year accounting basis in determin-
taxable net income.[8] [R. 67-68.] Section 188
ernal Revenue Code; *Gaylord v. Commissioner,*
415; *Fowler Bros. & Cox v. Commissioner,* 138
(C. A. 6th); *cf. Hash v. Commissioner,* 4 T. C.
ned, 152 F. 2d 722 (C. A. 4th), certiorari de-
U. S. 838, rehearing denied, 328 U. S. 879.
contrary to the taxpayer's claim (Br. 64), the
ing gift tax returns on the basis of irrevocable
not change the nature of the trusts and could
t the effect and application of the federal tax
more than could the Government's accepting re-
of funds in the renegotiation of war contracts
sis of the partnership's fiscal year accounting
Gaylord v. Commissioner, supra, p. 415.

urt's decision in *Giffen v. Commissioner,* 190 F. 2d 188,
shable in respect of this issue. There the fiscal year of
ship between the calendar-year taxpayer and his wife,
om transmuting their community property into property
ants in common and operating it under the partnership

As to the many cases cited by the taxpayer (F
34, 39, 40, 48), the District Court distinguishe
the principal ones (*Harris v. Commissioner,* 1
444 (C. A. 9th); *Greenberger v. Commissione*
2d 990 (C. A. 7th)) relied on by the taxpaye
Harris case, this Court merely reversed *per c*
remanded to the Tax Court to make findings re
the *Culbertson* decision, but expressed no opin
the merits of the case. While we think that th
in the *Greenberger* case is wrong, as being co
the proper application of the rationale of the
case, the facts there were more favorable towa
lishing a valid partnership than here. In any e
the *Tower, Lusthaus* and *Culbertson* cases laid
controlling law to the effect that the parties mus
intent *to carry on the business as partners* as
divide the income, the other cases cited by the
lead to no different result for they involved
factual situations. As stated in *Eisenberg v.*
sioner, 161 F. 2d 506, 510 (C. A. 3d), certior
332 U. S. 767:

> Little can be accomplished toward ultim
> mination of the tax responsibility, at lea
> class of cases, by ferreting out analogous
> other cases, particularly since "no one fa
> sive." It is well-settled that the Tax Cou
> mination, if supported by the facts, is
> That we would not be inclined to draw the
> clusions or make the same inferences is
> nificance whatever. * * *

Conclusion.

gment of the District Court is correct and should be affirmed.

Respectfully submitted,

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. TOLIN,
d States Attorney.

R. MCHALE,
tant United States Attorney.

, 1951.

APPENDIX.

Revenue Code:

11. Normal Tax on Individuals.

ere shall be levied, collected, and paid for each le year upon the net income of every individual mal tax * * *

J. S. C. 1946 ed., Sec. 11.)

22. Gross Income.

) *General Definition.*—"Gross income" includes , profits, and income derived from salaries, s, or compensaiton for personal service, of what- kind and in whatever form paid, or from pro- ns, vocations, trades, businesses, commerce, or or dealings in property, whether real or per- growing out of the ownership or use of or st in such property; also from interest, rent, nds, securities, or the transaction of any busi- carried on for gain or profit, or gains or profits ncome derived from any source whatever. * * *

J. S. C. 1946 ed., Sec. 22.)

166. Revocable Trusts.

here at any time the power to revest in the or title to any part of the corpus of the trust ted—

1) in the grantor, either alone or in conjunc-

then the income of such part of the trust
cluded in computing the net income of th

* * * * * * *

(26 U. S. C. 1946 ed., Sec. 166.)

SEC. 167. INCOME FOR BENEFIT OF GRA

(a) Where any part of the income of a

(1) is, or in the discretion of the
of any person not having a substantial
terest in the disposition of such part of
may be, held or accumulated for future
to the grantor; or

(2) may, in the discretion of the gra
any person not having a substantial ad
est in the disposition of such part of
be distributed to the grantor; or

* * * * *

then such part of the income of the trust
cluded in computing the net income of th

* * * * *

(26 U. S. C. 1946 ed., Sec. 167.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in
shall be liable for income tax only in their

182. TAX OF PARTNERS.

computing the net income of each partner, he include, whether or not distribution is made to

* * * * *

His distributive share of the ordinary net in- or the ordinary net loss of the partnership, ited as provided in section 183 (b).

J. S. C. 1946 ed., Sec. 182.)

188. DIFFERENT TAXABLE YEARS OF PARTNER AND PARTNERSHIP.

the taxable year of a partner is different from f the partnership, the inclusions with respect to et income of the partnership, in computing the come of the partner for his taxable year, shall sed upon the net income of the partnership for axable year of the partnership (whether begin- on, before, or after January 1, 1939) ending n or with the taxable year of the partner.

J. S. C. 1946 ed., Sec. 188.)

3797. DEFINITIONS.

When used in this title, where not otherwise ctly expressed or manifestly incompatible with tent thereof—

* * * * *

Partnership and Partner.—The term "part-

tion, or venture is carried on, and which is
the meaning of this title, a trust or estat
poration; and the term "partner" includes
in such a syndicate, group, pool, joint ven
ganization.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3797.)

Deering, California Civil Code (1949):

SEC. 2280. Unless expressly made irr
the instrument creating the trust, every
trust shall be revocable by the trustor by v
with the trustee. * * *

Treasury Regulations 111, promulgated un
ternal Revenue Code:

SEC. 29.22 (a)-1. *What Included in*
come.—Gross income includes in general
tion for personal and professional servic
income, profits from sales of and dealing
erty, interest, rent, dividends, and gains,
income derived from any source whatever
empt from tax by law. (See sections 2
116.) In general, income is the gain de
capital, from labor, or from both combin

* * * * *

IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

E. TOOR,

Appellant,

vs.

. WESTOVER,

Appellee,

E. TOOR AND FLORENCE D. TOOR,

Appellants,

vs.

. WESTOVER,

Appellee,

APPELLANTS' REPLY BRIEF.

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hip of the assets which yielded the income was a
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Code of Civil Procedure, Sec. 1963(23)

No. 12999.

IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

E. Toor,

Appellant,

vs.

. Westover,

Appellee,

E. Toor and Florence D. Toor,

Appellants,

vs.

. Westover,

Appellee,

APPELLANTS' REPLY BRIEF.

I.

The Facts.

tement of facts as presented in the Brief for the s, in substance, a mere repetition of the findings rial Court. The findings made by the Trial ich are particularly material to the matters in- this appeal, are without support in the evidence ontrary to the uncontroverted established facts

and a sham transfer, is utterly without support
trary to all of the evidence in this case. Th
troverted facts show: (1) gifts of cash funds
band and wife (the taxpayers) to a national ban
tee; (2) the actual ownership by the bank as
the cash funds thus received for the future
taxpayer's children (no payments to be made
until termination of the trusts which expire
children attain their respective ages of major
the organization of a limited partnership to
furniture manufacturing business; (4) the ban
a limited partner pursuant to clear and unequiv
ten partnership agreements, pursuant to which
acquired an ownership interest to the extent of
ownership for each of the two trusts; (5) the
did not in any manner own or benefit by the port
partnership owned by the bank; (6) the contr
cash to the partnership by the bank was in pro
the total capital of the partnership and the
rights of the parties to participate in profits; (
the taxpayers (Mr. Toor) became the general pa
received reasonable compensation for all services
to the partnership; (8) the bank as trustee
capital contributed by it to the partnership, a
quently owned the partnership interest from wh
accrued; (9) although the taxpayers originally
furniture manufacturing business, the same w

in accordance with the partnership agreements. of the parties complied with the terms of the ip agreement: (11) Mr. Toor exercised the of a general partner and these were each and sed for partnership purposes only; (12) the consulted and advised with Mr. Toor; (13) ere allocated in accordance with ownership of ctive partnership interests, all assets of the part- vere used only for partnership purposes; (14) crued to the trusts and there was no manner by taxpayer could deprive the trustee of the same; partnership was organized in 1942, when the the wood furniture manufacturing business in California was highly speculative; however, this iness, due to subsequent general wartime con- xperienced a windfall of large profits; (16) ie first few years of the partnership only ap- ly 40% of the profits were distributed and the as retained to meet the needs of rapidly expand- ne; (17) by reason of their ownership of the ip interest the trusts actually received their the profits; the Government assessed the tax- r income which taxpayers did not own, did not nd could not receive or benefit from.

he exception of matters pertaining to the ir- nature of the trusts (to which reference will

II.

The Ownership of the Assets Which Yielde come Was a True Ownership.

The capital contributed to the partnership was the trustee, the partnership interest acquired ment was likewise owned by the trustee, and nership agreement was clear and unequivocal. of these facts the Trial Court concluded that " tiff did not form and carry on as a partnership meaning of the Internal Revenue Code during a taxable years involved in this case, the furnitu facturing business known as The Furniture Guil fornia." In effect the Trial Court said that t a partnership "for income tax purposes."

As stated in the concurring opinion in *Barret missioner* (1st Circuit, 1950), 185 F. 2d 150, 1

> "In cases of this sort, involving taxati come of family partnerships, a great deal able confusion has been engendered by t (which obtained some currency) that an a which for general purposes would be deem nership under the usual common law test necessarily be recognized as a partnershi come tax purposes.' Thus was introduced a concept; and the need arose to give son definition of the special elements constitutin nership for income tax purposes,' where ported partnership is between members o mate family group. So far as I can see, t was utterly devoid of statutory basis, as is

d. 1659, the effect of that case is to sweep this
er notion into the discard. This is more sharply
ed up, perhaps, in the concurring opinion by Mr.
ce Frankfurter. But the same viewpoint is dis-
ble from a reading of the majority opinion as a
e."

ry way in this case the evidence demonstrates,
t of the income of the business, but an actual
roperty and the passing of title thereto, which
produced the income in question. The one-
nership of the partnership belonged to each of
s and the only way the taxpayers could get it
to buy it back the same as if owned by a
The bank, acting as a trustee, was a stranger,
nt and free acting, and not in any respect sub-
ie control of the taxpayer. Under the state of
ice in this case the Trial Court could not conclude
lealings between the taxpayer and the bank, and
gs between the bank and the partnership, were
ubterfuge, or concealment for the purpose of de-
[R. 137-160, 338-396, 439-443, 169-172.]

port the assertion that the ownership of the
terests in the partnership was a mere sham or a
llocation of income, would require a determina-
the taxpayer and the bank stood ready to violate
ership agreement and their fiduciary obligations
ne. At the time of trial the Trial Court recog-
t the evidence was all directly to the contrary.

ership should be disregarded for tax purposes bec
Toor, as the general partner in this limited pa
had the management and control of the entire
(Resp. Br. p. 12.) This is a reiteration of th
tion set forth in Finding 24, wherein the Tri
ruled that because of Mr. Toor's control and "ret
so many attributes of ownership of the trust
his business" he must be charged with the frui
capital he did not own. These "attributes of ow
in this case consist of nothing more than this no
trol Mr. Toor had as a general partner for the
ship purposes of a limited partnership.

The Trial Court disregards the question a
amount of income produced by capital of the
when in fact such capital was a major income p
factor, and the Trial Court further disregards
that Mr. Toor received a separate and reasona
pensation for all of his services and abliities, w
charged as an expense of operation and deducted
the computation of profits of the partnership.
payer having been fully compensated for everyt
he as an individual contributed to the partners
ness, the principal issue in this case is concerned
remaining income produced by the capital of the
ship, which should be taxed to the owners of t
nership, in accordance with the decision in *Luca*
281 U. S. 111, 50 S. Ct. 241. In spite of the fact
sixth of this partnership and its capital was actua
by each of the two trusts, the Court has determ
for tax purposes Mr. Toor should be regarde

er words, the Government is frankly contending
p. Br. p. 24, p. 19, footnote 6), and the Trial
as in effect ruled, that the normal management
rol of a general partner in a limited partnership
cient attribute of ownership to convert an other-
d partnership into an invalid one for tax purposes
e limited partners are members of the family and
e donated capital.

ontention is contrary to the principles enunciated
Tower and *Culbertson* cases. (See particularly
ence in the *Culbertson* case at 337 U. S. 744, 69
15.) In the words of the *Culbertson* case, such a
dicates at best an error in emphasis . . . and
cisive what was described as 'circumstances [to
into consideration" in making the determination
ether the partnership is real. See also, *Miller v.*
ioner (6th Cir. 1950), 183 F. 2d 246, 254; *Cobb*
issioner (6th Cir. 1950), 185 F. 2d 255, 258.
cases applying the principles of the *Culbertson*
ruled against this contention of the Government.
ger v. Commissioner (7th Cir. 1949), 177 F. 2d
nb v. Smith (3rd Cir. 1950), 183 F. 2d 938.

ue that the concurring opinion in the *Tower* case
the position presently urged by the Government,
a family limited partnership, formed with capi-
ted by the general partner, is not to be recog-
tax purposes. However, as specifically pointed
r. Justice Frankfurter in his concurring opinion
lbertson case (337 U. S. 750, 69 S. Ct. 1218),
wer opinion did not say what the Government

It is true that Mr. Toor in the exercise of h
as the general partner in a limited partnership
trol of the partnership business for partnership
Inherent in the nature of a limited partnersh
fact that the limited partners are inactive and
general partner is the active controlling participa
conduct of the partnership affairs. As stated in
curring opinion in *Barrett v. Commissioner*,
p. 154:

> "Not infrequently one or more *bona fide*
> may be inactive or dormant, this factor be
> pensated by the payment of salaries to t
> partners. So here, the partnership agreen
> vided that the partners 'shall be paid such s
> may be agreed upon, to be charged as an e
> the business.' Such an arrangement, so far
> see, involves no problem of *Lucas v. Earl,*
> U. S. 111, 74 L. Ed. 731. If the partnersh
> ment provides that the dormant partner is
> one quarter of the net profits, such share o
> income, whether distributed or not, is taxal
> dormant partner under I. R. C. sec. 182.
> taxable to the active partners on the theory
> 'earned' it."

In any event, the Trial Court ignored the d
between the control of an owner of a business a
only to himself, and the control of a general par
a business owned only in part by himself. Th
partner is limited by his fiduciary obligations, ar
wise limited by the provisons of his contract and
tations prescribed by law.

no "business purpose" in the formation of the
p. In this respect the Government contends
erm "business purpose" as used in the *Culbert-*
oes not exist unless there is a benefit to the busi-
p. Br. pp. 20-22). The Governments contention
spect is directly contrary to the substance of the
t opinion and would make one factor, to wit,
ce of a benefit to the business, conclusive. The
e not adopted the requirement that there be a
the business in order for the partnership to be
l. See *Miller v. Commissioner,* (6th Cir. 1950)
246, 254, which holds directly contrary to the
nt's contention. The *Culbertson* case states
S. 744, 69 S. Ct. 1215):

f upon a consideration of all of the facts, it is
l that the partners joined together in good faith
nduct a business, having agreed that the services
pital to be contributed presently by each is of
value to the partnership that the contributor
d participate in the distribution of profits, *that*
fficient." (Emphasis added.)

bmitted that what is meant by the phrase "busi-
ose" in the *Culbertson* opinion is simply a true
oin together for the purpose of carrying on the
rather than a *mariage de convenance.* See *Bar-*
mmissioner, supra, at page 151. *Cf. Slifka v.*
oner (2d Cir. 1950), 182 F. 2d 345, 346.

esent case is entirely distinguishable and unlike
f *Giffen v. Commissioner,* 190 F. 2d 188, de-

upon which to rest a valid partnership with the
In the instant cause the gifts in trust and the pa
arrangement were a part of a plan resulting fro
tic difficulties between Mr. and Mrs. Toor. It
time after the taxpayers determined a course o
with respect to their assets and provision for t
dren that the tax consequences were examined.
99, 103-105, 296-298, 309-310, 318-322, 327-3

As stated in *Barrett v. Commissioner, supra,* at

> "There is nothing in the law of federal in
> ation forbidding members of an intimat
> group who wish to go into business togethe
> a partnership because that form of busines
> zation is advantageous to them from the tax
> view."

The Government is clearly in error in asserting
Toor had complete and exclusive power of alloc
disposition of the income from the business. (
pp. 18, 19.) The provision vesting in the genera
the discretion as to when to distribute profits was
function of management, and in view of the
capital requirements of this business and the
which it was operating, a very necessary provis
course, Mr. Toor could not make distribution t
without making proportionate distribution to th
partners, and could not derive any personal ben

ly to all the partners. In this connection we Trial Court's observation during the trial [R. this very element indicated that the partner- *not* a paper organization.

overnment also observes that Mr. Toor was em- o terminate the partnership by appropriate notice t the limited partners (Resp. Br. p. 18). How- Toor could not in any way deprive the trusts of ership of their proportionate shares of the busi- of their accrued income; in order to acquire rests he would have had to pay full book value [R. 37-38]. Furthermore, the testimony dis- t the provision had a valid business reason [R. and in addition, was a perfectly normal pro- a limited partnership. Of course, if Mr. Toor nased the interest of the partners, they could rwise invested these same funds in accordance rust agreement.

overnment contends that the limited partners exercise their rights as such. The evidence radicted that the bank did use independent ; that Mr. Toor kept the bank informed of uct of the business, and consulted with the ers from time to time; that the bank received l accountings and did consider the same, and felt that the bank met with Mr. Toor for the pur-

national bank. No instance has ever been sugges
what other advice the bank could or should have
any time. It is true that the bank did not feel ca
to assert its rights by legal process, because it w
fied that the business was properly conducted an
was receiving everything to which it was entitled

In the face of this uncontradicted testimony
dence in this case, the Court made its findings nu
and 23, clearly holding and finding that at no tim
no instance did the bank use independent judg
suggest any action or exercise any of its rights
way of advice, and that the bank did not exercis
ion or control over the trust *corpus* in the busi
did not influence the conduct of the partnershi
disposition of its income. In view of this misc
by the Court it is evident that only an improper
has resulted.

The Government urges that there was no trust
pleted gift because the trusts and the partners
completed as "one package." We note that th
was empowered to invest in securities of the
States and of the states and instrumentalities
as well as in businesses in which Mr. Toor par
as a principal, and that they actually did so invest
event the mere fact that the trusts and partners
concluded at the same time would not invalidate
or render the same incomplete. In so far as ou
inquiry is concerned, the same result would h
achieved if the taxpayers had given to the trust

vas effectuated, the gift was complete and the me the actual owners of their respective part-terests. A man may give to his children di-rt of the real property he owns or part of the stock of a business in which he is principal , or he may give them the money with which e such assets; in either event, the children as e taxable with the income therefrom. See *Commissioner* (6th Cir. 1937), 90 F. 2d 323; *Commissioner,* (1941), 45 B. T. A. 855.

al matter, the Government contends that in any Trial Court looked at all the circumstances in with the *Culbertson* opinion and found as a a lack of intent to form a valid partnership, ore that its findings are conclusive. However, en demonstrated, this conclusion is based upon dings which have no support in the evidence, upon the part of the Trial Court to consider erial facts and represents an improper applica-principles of law enunciated in the *Culbertson* is respectfully submitted that an inference of ontrary to all of the evidentiary facts may not by the Trial Court at will and without chal-

n of the Court is also respectfully invited to the which contains the relevant portions of the Rev-f 1951 recently adopted, and the pertinent sec-ne hearings of the Senate Finance Committee hich deal specifically with many of the issues

III.

The Argument With Respect to the Date of bility of the Trusts.

The argument for the Government with resp irrevocability of the trusts pointedly ignores th tion brought out by Appellants between the ir clerical or typing error of the instant case, and presented in *Gaylord v. Commissioner* (9th Cir. 1 F. 2d 408, where the document was in the form payer intended but where he erred in interp legal effect. The Government contents itself portion of the argument with simply pointing ou trust documents, as originally executed, did no a provision making them irrevocable; that un fornia law they were therefore revocable and ruling of the Trial Court that the instruments taken as written, is obviously correct. (Resp. B 31.)

If the parties had signed the trust document, it to be irrevocable but failed to include an irre clause either because they thought it was not or because they did not think about it at all, have a situation similar to that presented in th case. However, here the parties had seen, revi discussed the drafts of the documents containi revocability clause but by the time they came t the irrevocability clause had been inadvertentl from the final draft by a typing error; they believing the document they signed to be a tru the draft they had seen, including the clause in

dated December 14, 1943 confirming what the
ıtention was, the Trial Court should have ac-
ognition to the nature of the error, and read
ents as if the irrevocability clause had been con-
rein. This would have followed the dictates of
of the Civil Code of California which provides
e through mistake or accident a written contract
press the real intention of the parties, such in-
to be regarded. By properly construing the in-
in accordance with Sec. 1640, the Court would
been reforming the instruments nor converting
into one for reformation.

ial Court in this case was called upon to rule
issue just is it was called upon to rule and did
ıgh incorrectly) as to whether or not the in-
was executed on the date it bore or on some
. The Trial Court erred in stating that for
ses it was compelled to take the instrument as
nd further erred in avoiding a decision on this
he premises that this was not an action for ref-

e, that the *Gaylord* ruling is based, at least in
ıe rule that parole evidence was inadmissible to
lain terms of the instrument therein questioned.
in the instant case, the type of error we have
imperfection in the writing—has specifically
an exception to the parole evidence rule.
California Code of Civil Procedure, Sec. 1856;
il Code, Sec. 1640.

Trust. This is so for the same reason as abov
to—the type of error corrected was an imperfect
writing, and the original instruments were n
stored to the condition the parties thought the
when they signed them.

In the *Gaylord* case, the taxpayer, having s
document that he intended to sign, was entitled
it to conform to his original intent, but the cha
not be given retroactive effect. In our case, th
of the instruments dated December 14, 1943
different; it was not merely to restore an intent
supposed to have been conveyed by the instrume
restore the words themselves which were omi
typing error and to confirm the original inte
correction of this type of error should be given
active effect in accordance with Section 1640 of
Code.

Finally, with respect to Appellants' contentio
documents were executed on December 14, 19
than on January 13, 1944 as the Trial Court fou
ing 14), the Government misconstrues the rule
plicable to the evidence.

It is not disputed that the only evidence on
consists of the documents themselves which
WITNESS WHEREOF, the parties hereto do he
their hands this 14th day of December, 1943."
179]. The signatures of the bank officers were
edged on January 13, 1944. This acknowled
not recite that they *executed* the instruments o
13, 1944, but simply that these officers attested

vernment asserts that in the absence of any nce, we must take the date of execution to be f acknowledgment. This is directly contrary , and furthermore, the Government misreads s of the acknowledgment, for the Government states that the acknowledgment recites that nents were not signed until January 13, 1944. e noted that there was no requirement that the s dated December 14, 1943 be acknowledged in e effective.

is clear that under the state of the evidence ust take the date the instrument bears, Decem-43, as the date on which all the parties executed ent. Section 1963 (23) of the Code of Civil of the State of California provides that it is that a writing is truly dated. Section 1961 de of Civil Procedure provides: "A presumption clared by law to be conclusive) may be contro-other evidence, direct or indirect; but unless so ed the jury are bound to find according to the n." Since there was no evidence whatsoever, ndirect, to controvert the presumption furnished trument itself and its recital that the parties on December 14, 1943, the Court was com-ind in accordance therewith. *Crabbe v. Ma-nnel Gold Min. Co.*, 168 Cal. 500, 506, 143 716 *In re Roberts Estate*, 49 Cal. App. 2d 71, 933.

We note further, that the Government has that this inadvertent omission of the irrevoc vision from the original trust instruments su Court's conclusion as to the lack of intent to fo faith partnership (Resp. Br. pp. 17-18). Ho undisputed that the actual intent of the part include an irrevocability provision and to mak irrevocable. The inadvertent omission could way support a finding as a factual matter of intent to form a partnership.

Conclusion.

It is respectfully submitted that the decis Trial Court should be reversed.

Respectfully submitted,

FINK, ROLSTON, LEVINTHA
LEO V. SILVERSTEIN,
SCHWARTZ, GALE & BLOOM
Attorneys for Ap

Act of 1951, approved October 20, 1951
521-Public Law 183):

0. Family Partnerships.

finition of partner.—Section 3797(a)(2) (26
. Sec. 3797(a)(2)) is hereby amended by add-
end thereof the following: 'A person shall
ed as a partner for income tax purposes if he
ital interest in a partnership in which capital
ial income-producing factor, whether or not
st was derived by purchase or gift from any
n.'

location of partnership income.—Supplement F
1 (26 U. S. C. A. Sec. 181 *et seq.*) is hereby
y adding at the end thereof the following new

91. Family partnerships.

case of any partnership interest created by
istributive share of the donee under the part-
reement shall be includible in his gross in-
pt to the extent that such share is determined
owance of reasonable compensation for ser-
red to the partnership by the donor, and ex-
extent that the portion of such share attribu-
ated capital is proportionately greater than the
e donor attributable to the donor's capital. The
share of a partner in the earnings of the part-
ll not be diminished because of absence due to

be considered to be donated capital. The "
any individual shall include only his spouse,
and lineal descendants, and any trust for the pri
fit of such persons.'

"(c) Effective date.—The amendments ma
section shall be applicable with respect to tax
beginning after December 31, 1950. The de
as to whether a person shall be recognized as
for income tax purposes for any taxable year
before January 1, 1951, shall be made as if t
had not been enacted and without references d
the fact that this section is not expressly made
with respect to taxable years beginning befor
1, 1951. In applying this subsection where
year of any family partner is different from
year of the partnership—

"(1) if a taxable year of the partnership
in 1950 ends within or with, as to all of the f
ners, taxable years which begin in 1951, then
ments made by this section shall be applicable w
to all distributive shares of income derived by
partners from such taxable year of the part
ginning in 1950, and

"(2) if a taxable year of the partnership
1951 ends within or with a taxable year of
partner which began in 1950, then the amendm
by this section shall not be applicable with res
of the distributive shares of income derived by
partners from such taxable year of the partne

nily partnerships

339 of your committee's bill is intended to har-
e rules governing interests in the so-called
nership with those generally applicable to other
roperty or business. Two principles governing
of income have long been accepted as basic:
e from property is attributable to the owner of
ty; (2) income from personal services is at-
o the person rendering the services. There is
for applying different principles to partnership
f an individual makes a bona fide gift of real
of a share of corporate stock, the rent or divi-
ne is taxable to the donee. Your committee's
makes it clear that, however the owner of a
interest may have acquired such interest, the
axable to the owner, if he is the real owner. If
hip is real, it does not matter what motivated
r to him or whether the business benefited from
ce of the new partner.

gh there is no basis under existing statutes for
nt treatment of partnership interests, some de-
his field have ignored the principle that income
rty is to be taxed to the owner of the property.
t decisions since the decision of the Supreme
Commissioner v. Culbertson (337 U. S. 733)
invalid for tax purposes family partnerships
e by virtue of a gift of a partnership interest
nember of a family to another, where the do-
ned no vital services for the partnership. Some
ses apparently proceed upon the theory that a

that a gift of a partnership interest is not comple
the donor contemplates the continued participat
business of the donated capital. However, the
with which the Tax Court, since the Culbertso
has held invalid family partnerships based upon
of capital, would seem to indicate that, althoug
ions often refer to 'intention,' 'business purpose
and 'control,' they have in practical effect reac
which suggest that an intrafamily gift of a p
interest, where the donee performs no substanti
will not usually be the basis of a valid partnersh
purposes. We are informed that the settlemen
cases in the field is being held up by the relia
field offices of the Bureau of Internal Reve
some such theory. Whether or not the opinion
preme Court in Commissioner v. Tower (327 U
and the opinion of the Supreme Court in Comm
Culbertson (337 U. S. 733), which attempted
the Tower decision, afford any justification fo
fusion is not material—the confusion exists.

"The amendment leaves the Commission and
free to inquire in any case whether the don
chaser actually owns the interest in the partner
the transferor purports to have given or sold h
will arise where the gift or sale is a mere sha
cases will arise where the transferor retains
of the incidents of ownership that he will cont

rt in an analogous trust situation involved in
Helvering v. Clifford (309 U. S. 351). The
lards apply in determining the bona fides of
nily partnerships as in determining the bona
other transactions between family members.
ns between persons in a close family group,
not involving partnership interest, afford much
for deception and should be subject to close
All the facts and circumstances at the time of
ted gift and during the periods preceding and
it may be taken into consideration in deter-
bona fides or lack of bona fides of a purported
le.

ery restriction upon the complete and unfet-
ol by the donee of the property donated will
ve of sham in the transaction. Contractual re-
nay be of the character incident to the normal
os among partners. Substantial powers may be
the transferor as a managing partner or in
fiduciary capacity which, when considered in
f all the circumstances, will not indicate any
ie ownership in the transferee. In weighing
f a retention of any power upon the bona fides
rted gift or sale, a power exercisable for the
others must be distinguished from a power
he transferor for his own benefit.

be respected for tax purposes without regard t
tives which actuated the transfer, it is cons
propriate at the same time to provide specific sa
whether or not such safeguards may be inher
general rule—against the use of the partnershi
accomplish the deflection of income from the r

"Therefore, the bill provides that in the ca
partnership interest created by gift the allocat
come, according to the terms of the partners
ment, shall be controlling for income-tax pu
cept when the shares are allocated without pro
ance of reasonable compensation for services r
the partnership by the donor, and except to
that the allocation to the donated capital is prop
greater than that attributable to the donor's
such cases a reasonable allowance will be ma
services rendered by the partners, and the bala
income will be allocated according to the amou
tal which the several partners have invested.
the distributive share of a partner in the earni
partnership will not be diminished because of a
to military service.

"When more than one member of a family is
of a partnership, all interests purchased by o
of the family from another will be treated as
transfer were made by gift. For this purpose

Errata in Appellant's Opening Brief.

4: The citation for Thomas v. Feldman should

omas v. Feldman (5th Cir. 1946), 158 F. 2d
Feldman v. Thomas, 34 A. F. T. R. 1631.

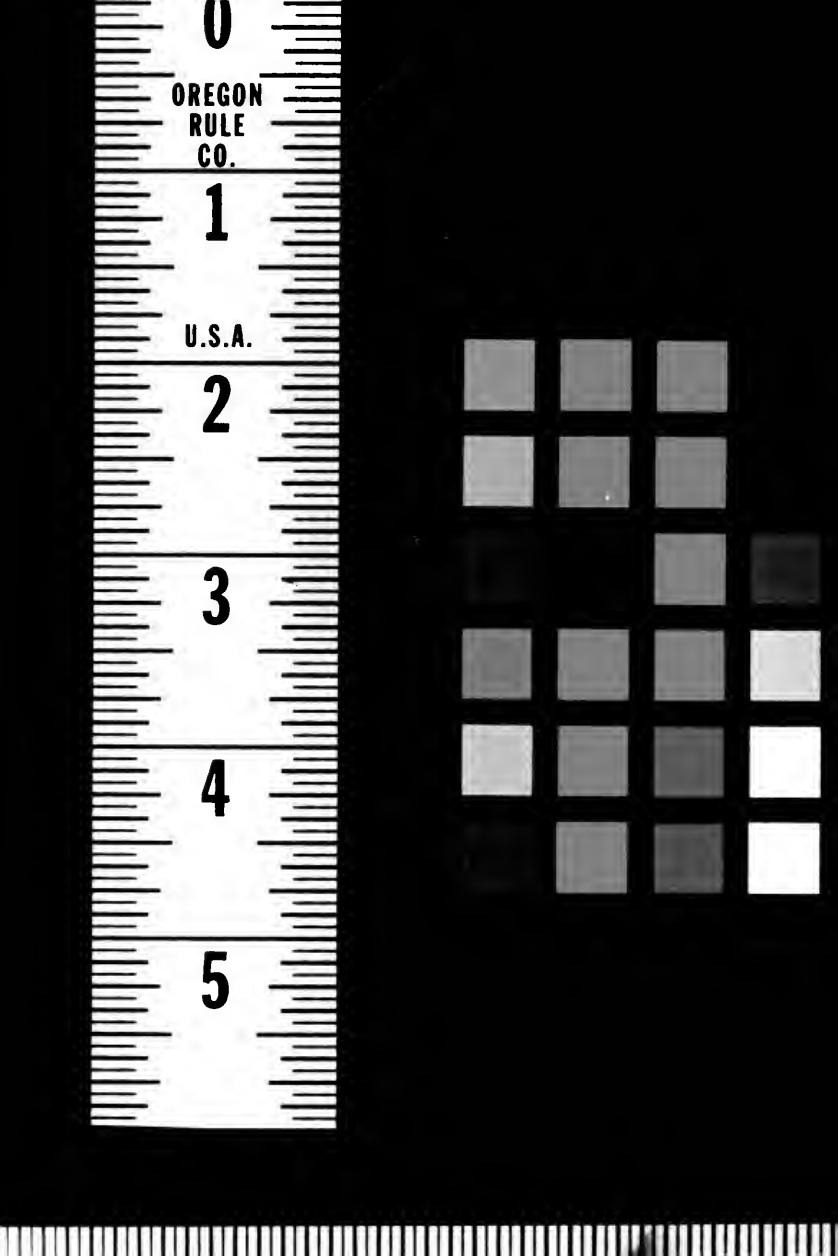
5: The first page reference to the transcript
on line 3 should read: R. 137-160 instead of

7: The period in the first sentence of the last
should be changed to a comma so that the
reads:

ank was also consulted and its agreement was
and obtained for the termination of the part-
he distribution of the assets and investment in
ration which succeeded to the business of the
p."

: The word appearing as "severly" on the 13th
d be "severely."

5: The word "revocable" in the next to the
f the first paragraph should be "irrevocable."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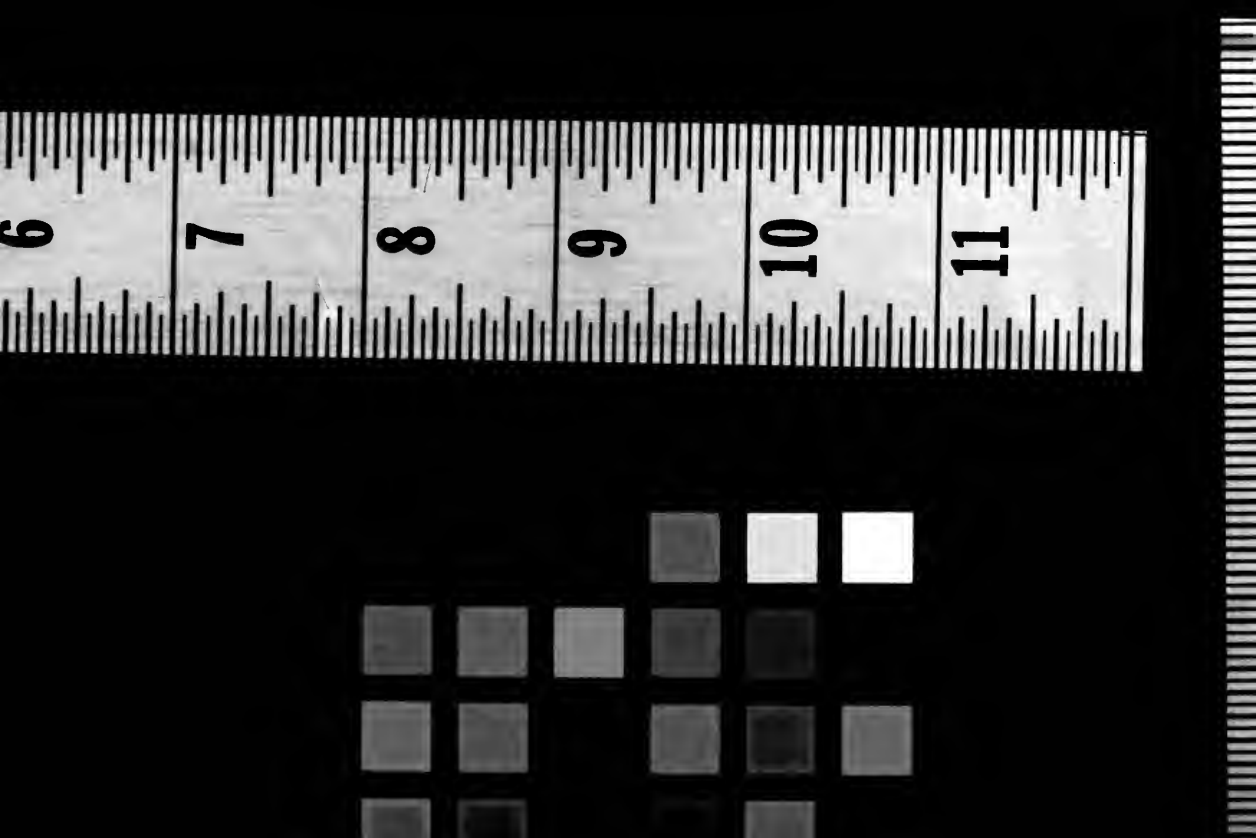
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